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Supreme Court, U.S.
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Supreme Court of the United States

THE PERMANENT MISSION OF INDIA
TO THE UNITED NATIONS AND THE
PERMANENT REPRESENTATIVE OF MONGOLIA
TO THE UNITED NATIONS,

Petitioners,

v.

THE CITY OF NEW YORK,

Respondent.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Second Circuit**

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the exception to sovereign immunity for cases "in which . . . rights in immovable property situated in the United States are in issue," 28 U.S.C. § 1605(a)(4), provide jurisdiction for a municipality's lawsuit seeking to declare the validity of a tax lien on a foreign sovereign's real property when the municipality does not claim any right to own, use, enter, control or possess the real property at issue?

2. Is it appropriate for U.S. courts to interpret U.S. statutes by relying on international treaties that have not been signed by the U.S. Government and that do not accurately reflect international practice because they have only been signed by a limited number of other nations?

STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

Petitioner The Permanent Mission of India to The United Nations is an agency and instrumentality of The Republic of India, a sovereign state.

Petitioner The Permanent Representative of Mongolia to The United Nations is an agent and instrument of The Republic of Mongolia, a sovereign state.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners The Permanent Mission of India to the United Nations and The Permanent Representative of Mongolia to the United Nations respectfully request that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in this case on April 26, 2006.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Second Circuit, dated April 26, 2006, is reported at 446 F.3d 365 and is reproduced at Appendix ("App.") 1.

The decision of the United States District Court for the Southern District of New York, dated July 7, 2005, is reported at 376 F. Supp. 2d 429 and is reproduced at App. 25.

STATEMENT OF JURISDICTION

Petitioners seek review of the opinion and order of the United States Court of Appeals for the Second Circuit, dated April 26, 2006. The United States Supreme Court has jurisdiction to review decisions of the federal courts of appeals by virtue of 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This appeal raises questions concerning the proper interpretation and scope of 28 U.S.C. § 1605(a)(4), reprinted at App. 46.

STATEMENT OF THE CASE

Petitioners each own a building in Manhattan that is devoted entirely to offices for their respective Permanent Missions to the United Nations and residences for the diplomatic staff attached to those Missions. Every resident in each building possesses either a G-1 or G-2 visa (limited to employees of a permanent mission of a recognized government accredited to an international organization and their immediate families) or an A-1 visa (limited to foreign diplomats and consular officers and immediate family). Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 163 (codified as amended at 8 U.S.C. §§ 1101 *et seq.*). Even though the properties in question are used exclusively to support the two sovereign states' diplomatic missions, the City of New York maintains that these two buildings are subject to the City's real property tax to the extent they are used as residences for diplomats other than an Ambassador or Consul General. As of January 2003, the total amount of taxes assessed by the City exceeded $16 million, after which time the City sued in New York State Supreme Court to enforce tax liens and collect the taxes that arose by operation of statute when the Missions resisted payment, based on their sovereign immunity. The City disclaimed, however, any right to foreclose on the properties or otherwise seek ownership, possession or control of the properties. App. 83-84. The City also instituted parallel actions to collect taxes from

other Missions, including the Republic of the Philippines. App. 4 at n.2.

The petitioners removed the actions to the United States District Court for the Southern District of New York under 28 U.S.C. § 1441(d), which provides for removal by a foreign state or its instrumentality. After discovery on the issue of jurisdiction, the petitioners moved to dismiss the City's actions under the Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. §§ 1602 *et seq.*, which provides that, subject to existing international agreements and to the enumerated exceptions in 28 U.S.C. § 1605, "a foreign state shall be immune from the jurisdiction of the courts of the United States or of the States. . . . " 28 U.S.C. § 1604.

The district court denied the motion, holding that the City's actions fell within the statutory exception to foreign sovereign immunity created by 28 U.S.C. § 1605(a)(4) for cases "in which . . . rights in immovable property situated in the United States are in issue." App. 5.[1] After requesting the views of the Department of State on the relevance of certain international conventions to the construction of § 1605(a)(4)'s "immovable property" exception, and the diplomatic and foreign relations consequences of recognizing the exception in this case, the Court of Appeals for the Second Circuit rejected the Government's advice and affirmed.[2] The court acknowledged that on "facts very

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[1] The district court found it unnecessary to decide whether the City's actions satisfied the separate FSIA exception under 28 U.S.C. § 1605(a)(2) for actions "based upon a commercial activity carried out in the United States by the foreign state." App. 5.

[2] The Court of Appeals concluded that appellate jurisdiction was proper under the collateral order doctrine. App. 5. *See generally Foremost McKesson, Inc. v. Islamic Republic of Iran*, 905 F.2d 438, 443 (D.C. Cir. 1990).

similar to those of this case," the Court of Appeals for the Third Circuit had found the "immovable property" exception did not allow jurisdiction over a New Jersey municipality's real property tax enforcement action against property used by Libya's United Nations Ambassador. App. 20 at n.15. Nevertheless, the Second Circuit rejected the Third Circuit's reasoning, agreeing instead with the district court below, that a real property tax enforcement action constituted a case "in which . . . rights in immovable property . . . are in issue." App. 2, 26.

On June 1, 2006, the Second Circuit stayed issuance of the mandate pending determination of a petition for a writ of certiorari in the Supreme Court.

REASONS FOR GRANTING THE PETITION

A. Review is Necessary to Resolve a Circuit Conflict

If the Second Circuit's ruling below is left to stand, foreign governments that own real property in New Jersey will be immune from real property tax lawsuits while foreign governments that own real property across the Hudson River in New York will be subject to real property tax lawsuits, even if they use the property exclusively for diplomatic purposes. The FSIA was enacted to eliminate "disparate treatment of cases involving foreign governments" because Congress recognized that resentment against disparate treatment in such cases carries "adverse foreign relations consequences." H.R. Rep. No. 1487, 94th Cong., 2d Sess. 13 (1976). Consequently, the FSIA was enacted to provide the sole basis for subject matter jurisdiction over suits against foreign states, and to provide

for removal of state court actions to federal courts in light of "the importance of developing a uniform body of law." H.R. Rep. No. 1487, 94th Cong., 2d Sess. 32 (1976). This Court should grant a writ of certiorari to resolve the Second and Third Circuits' conflicting interpretations of the FSIA's "rights in immovable property" exception to a foreign state's sovereign immunity found at 28 U.S.C. § 1605(a)(4) to avoid the inevitable disparate treatment of foreign governments that is sure to flow from the Second Circuit's ruling.

In *City of Englewood v. Socialist People's Libyan Arab Jamahiriya*, 773 F.2d 31 (3d Cir. 1985), the City of Englewood assessed real property taxes on property the Government of Libya had purchased in New Jersey for use as a "weekend retreat" by Libya's Head of Mission, and sued the Government of Libya in New Jersey Tax Court to enforce a tax lien and compel payment of real estate taxes. *Id.* at 32-33. Libya removed the case to federal court and moved to dismiss for lack of subject matter jurisdiction. *Id.* at 32. The district court denied the motion to dismiss, finding jurisdiction under the "rights in immovable property" exception to sovereign immunity in 28 U.S.C. § 1605(a)(4). *Id.* at 33-34.

The Third Circuit reversed. It read the text and history of § 1605(a)(4) merely as codifying "the recognized principle of international law that a sovereign may resolve *disputes over title to real estate within its geographical limits.*" *Id.* at 36 (emphasis added). The Third Circuit also relied on *Asociacion de Reclamantes v. United Mexican States*, 735 F.2d 1517, 1522 (D.C. Cir. 1984) (Scalia, J.), *cert. denied*, 470 U.S. 1051 (1985), in which the D.C. Circuit had concluded that the statutory FSIA exemption, "like the traditional real property exception it was

intended to codify, is limited to disputes directly implicating property interests or rights to possession." *Id.* Based on the D.C. Circuit's reasoning in *Reclamantes* and its own analysis of the "plain language" of the statute and its legislative history, the Third Circuit concluded that § 1605(a)(4) did not provide jurisdiction to hear a dispute over enforcement of real property taxes or a tax lien because "[n]o one disputes Libya's title to the Englewood premises or its right to exclude others from possession thereof." *Id.*

Although the Second Circuit conceded that the *City of Englewood* case "involved facts very similar to those of this case," App. 20 at n.15, the Second Circuit issued a decision in this case in direct conflict with the Third Circuit's ruling, stating merely that "we decline to adopt the reasoning of *City of Englewood*." *Id.* The Second Circuit purported to rely on the D.C. Circuit's decision in *Reclamantes*, App. 19-20, the same decision the Third Circuit had read to support its opposite interpretation of the scope of the FSIA's "immovable property" exception to sovereign immunity.

As a result of the split caused by the Second Circuit's ruling in this case, the side of the Hudson River on which a foreign state locates a diplomatic mission now determines whether that foreign state's diplomatic mission is subject to local real estate tax litigation. The Second and Third Circuits' different interpretations of the *Reclamantes* opinion also render unclear whether the courts have jurisdiction to enforce tax liens against property owned by foreign sovereigns in the District of Columbia. The need for uniformity in our nation's international relations mandates that the happenstance of where a foreign state locates its diplomatic property in the U.S. should not

determine the extent of that foreign government's sovereign immunity. Given that the D.C., Second and Third Circuits are three of the circuits in which the "immovable property" exception is most likely to arise, it is especially appropriate for this Court to resolve the current federal judicial circuit split over whether the "immovable property" exception in 28 U.S.C. § 1605(a)(4) extends jurisdiction to U.S. courts to enforce tax liens against real property used by foreign sovereigns for diplomatic purposes.

B. The Second Circuit Did Not Properly Consider the United States' Foreign Policy Concerns of Documented Retaliation Against U.S. Property Abroad and Inevitable Conflict with the United Nations

This is not New York City's first attempt to tax foreign diplomatic property. *See Republic of Argentina v. City of New York*, 250 N.E.2d 698 (N.Y. 1969). The City of New York has already sued the Republic of the Philippines, seeking a declaration of validity for a $17.7 million tax lien on the building housing the Philippines' Permanent Mission to the United Nations, and "the City has publicly named other embassies as offenders, and so may well seek to initiate further proceedings if successful here." App. 4 at n.2. Nearly 40 years ago in *Republic of Argentina*, a case heard before the FSIA was enacted, the State Department prophetically warned that "[i]f left unchecked," local government taxation of foreign government-owned real property "will prejudice and hamper the effective conduct of our foreign relations." *Republic of Argentina*, 250 N.E.2d at 700. The Department of State reiterated the very same warning in this case. App. 73-75.

Before ruling in this case, the Second Circuit invited the State Department's advice as to whether diplomatic and foreign relations concerns counsel a narrow or expansive interpretation of § 1605(a)(4). App. 53. In response, the State Department advised the panel that "[c]onsiderations of diplomatic and foreign relations counsel in favor of a narrow reading of the immovable property exception to sovereign immunity, and against an assertion of jurisdiction over this dispute over taxes on a diplomatic property." App. 73. It cautioned that "the U.N. diplomatic community would respond vigorously" to a ruling that allowed municipalities to enforce tax liens against their diplomatic missions and that "a finding of jurisdiction here would . . . trigger a confrontation between the United States and the United Nations that could have serious implications for their diplomatic relationship." App. 73-74. Indeed, it reported that "bilateral relations with one of the sovereign defendants have already been adversely affected by the suit and the district court's assertion of jurisdiction over this sovereign; specifically, the sale of a major piece of U.S.-owned property has been blocked." App. 74-75. Having solicited the State Department's advice, the Second Circuit thereupon rejected the State Department's concerns as "vague" and "speculative." App. 22 at n.17.[3]

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[3] The Second Circuit seems to have believed that the Government's concerns deserved less serious consideration because the Government did not submit a "statement of interest" under 28 U.S.C. § 517, but rather provided its views in response to the panel's invitation. App. 21 at n.17. Drawing a negative inference from the Government's initial silence is not consistent with the purpose of the FSIA, which was enacted in part to relieve the executive branch from the obligation to take sides in sovereign immunity disputes. *See Verlinden BV v. Central Bank of Nigeria*, 461 U.S. 480, 488 (1983).

Petitioners do not contend that the State Department's foreign policy views should necessarily govern the construction of § 1605(a)(4)'s "immovable property" exception. Nevertheless, the State Department's views on the foreign policy impact of a specific construction of the "immovable property" exception should be entitled to deference by the courts because matters of diplomatic and foreign policy concerns are uniquely within the province of the Executive Branch. In *Republic of Austria v. Altmann*, 541 U.S. 677 (2004), this Court taught that "the Executive's views on questions within its area of expertise merit greater deference than its opinions regarding the scope of a congressional enactment." *Id.* at 702 n.23. The Second Circuit in this case disregarded the lesson of *Altmann* and relegated its discussion of the Executive's views on the foreign policy impacts of interpreting the "immovable property" exception broadly to a single dismissive footnote, giving little, if any, deference to its views that "considerations of foreign policy . . . counsel heavily in favor of a restrained reading of the immovable property exception to sovereign immunity." App. 75. Given that the United States has 272 embassies, consulates, and diplomatic missions in 166 foreign countries, the diplomatic stakes in this litigation far transcend the interests of the specific parties and include the likely application of similar assertions of jurisdiction and taxation by local governments against U.S. Government-owned property in foreign countries. *See, e.g., Boos v. Barry*, 485 U.S. 312, 323-24 (1988) ("the concept of reciprocity that governs much of international law . . . ensures that similar protections will be accorded those that we send abroad to represent the United States . . . mak[ing] our national interest in protecting [foreign] diplomatic personnel powerful indeed."). Moreover, the negative foreign policy consequences

identified by the Executive were neither "vague" nor "speculative" and surely implicate pressing foreign relations concerns regarding the appropriate interpretation of the Foreign Sovereign Immunities Act that are deserving of serious consideration. As such, this Court's independent review of the Second Circuit's ruling below is warranted.

Additionally, given the diplomatic and foreign policy implications of the judgment below, we respectfully suggest that this case may be an appropriate case in which to invite the Solicitor General to express further the views of the United States.

C. The Second Circuit Impermissibly Used International Law to Expand the FSIA's "Immovable Property" Exception Beyond the Scope Warranted by the FSIA's Text and History

When considering the scope of the term "rights in immovable property" in the FSIA's real property exception to sovereign immunity, 28 U.S.C. § 1605(a)(4),[4] the court's task "is not to give the term the most expansive reading possible, nor to extract from different sources of law an artificial consensus definition of the term, but to determine what Congress meant by the language in this particular statute." *Asociacion de Reclamantes*, 735 F.2d at 1521 (Scalia, J.). Disregarding the D.C. Circuit's admonition, the Second Circuit largely ignored the common law and customary international law background against

[4] Under FSIA, foreign states are immune from jurisdiction in federal as well as state courts unless the dispute falls within one of the exceptions to immunity recognized by that Act. *Verlinden*, 461 U.S. at 489 (1983); *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 434-35 (1989).

which the FSIA was written. Instead, and again contrary to the Government's advice, it relied on two international conventions, the European Convention on State Immunity and the UN Convention on Jurisdictional Immunities of States and their Property,[5] to create what the Second Circuit called a "more detailed and workable standard" for § 1605(a)(4)'s exception to a foreign state's sovereign immunity. App. 20. Neither of the conventions relied upon by the Second Circuit accurately reflects international practice in 1976 when Congress enacted the FSIA, and neither reflects the current state of international law in 2006. Indeed, as the State Department advised the panel and as all the parties agreed, App. 58-59, 77 and 94, the European Convention and the UN Convention do not apply to cases like this one, but rather apply exclusively to the relations between states and *private* parties.[6] Moreover, neither document has been signed by the United States, or by the foreign sovereign petitioners in this case. Additionally, although the European Convention antedated the FSIA, it does not serve as a reliable indicator of international law because, while it has been open for signature for more than 34 years, only eight of the 46 member states of the Council of Europe have signed it. As for the UN Convention, it postdates the FSIA by 28 years

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[5] European Convention on State Immunity, May 16, 1972, ETS No. 74, *reprinted in* 11 ILM 470 (1972); U.N. Convention on Jurisdictional Immunities of States and Their Property, G.A. Res. 59/38, U.N. Doc. A/RES/59/38 (Dec. 2, 2004).

[6] Although petitioners do not contend that the Executive Branch's views are necessarily determinative of the construction of § 1605(a)(4), to the extent that the Second Circuit relied on international conventions to interpret § 1605(a)(4), certainly the State Department's developed expertise in the application of those international conventions deserved deference and was relevant to the court's inquiry.

and has not been signed by a sufficient number of states to come into effect.

While international conventions may inform the proper interpretation of U.S. law intended to codify preexisting international law, it is not permissible to use international conventions that have not been signed by the United States, do not accurately reflect international practice and, in the case of the UN Convention, postdate FSIA to read into Congress's text a "more detailed and workable" standard that Congress did not supply. App. 20. Indeed, to the extent that the European Convention's text may be used to interpret what Congress meant, the relevant portions of the European Convention text have been identified in the FSIA's legislative history. Thus, 28 U.S.C. § 1607(b), which provides an exception to sovereign immunity for counterclaims "arising out of" the subject matter of the foreign state's claims, may properly be interpreted in light of the European Convention's similar language because the House Report says that this statutory exemption is "based upon article 1 of the European Convention." H.R. Rep. No. 1487, 94th Cong., 2d Sess. 23 (1976). In contrast, Congress did not use the European Convention's "arising out of" language when it enacted § 1605(a)(4). While the European Convention's immovable property exception applies to all "obligations arising out of" immovable property, *see supra* n.5, ETS No. 74 at Art. 9, the U.S. Congress did not borrow the "arising out of" test for the immovable property exception when it enacted the FSIA. Rather, it selected very different language, applicable only to cases in which "rights in immovable property" are "in issue." 28 U.S.C. § 1605(a)(4). Where, as here, Congress selected the European Convention's broad "arising out of" language in one section of the statute, but

chose narrower "in issue" language in other parts of the same statute, basic rules of statutory construction require that the different language be given different effect. *See, e.g., United States v. Gonzales*, 520 U.S. 1, 5 (1997) ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely."). Accordingly, the only guidance available from the European Convention's immovable property exception is that Congress intended a narrower exception when it enacted § 1605(a)(4).

The Second Circuit's importation of the European Convention's "arising out of" test to expand the scope of § 1605(a)(4) is suspect for other reasons as well. At the time the FSIA was enacted, settled international practice used a broad "arising out of" test to identify when foreign sovereigns were *immune*. Under this test, a foreign sovereign was generally immune from suit in cases involving a "*claim arising out of* a foreign state's ownership or possession of immovable property," but the foreign sovereign was not immune from cases involving a claim "contesting such ownership or the right to possession." Restatement (Second) of Foreign Relations Law § 68, cmt. d (1965) (emphasis added); *see also Documents of the Thirty-Fifth Session*, 1983 Y.B. Int'l L. Comm'n 48, U.N. Sales No. E.84.V.7 (Part I) ("judicial practice . . . seems to bear out the absence of immunity for proceedings involving determination of ownership of property and its acquisition or title under the internal law of the State of the *situs* by the territorial court").

The Second Circuit also ignored the distinction under U.S. law between "rights in" real property and mere security interests in real property. As this Court held in

Department of the Army v. Blue Fox, Inc., 525 U.S. 255, 262 (1999), liens "are merely a means to the end of satisfying a claim for the recovery of money." The City's lien is merely a device through which the City may seek to enforce its tax claim. The lien is not a "right in immovable property" as that phrase has traditionally been understood by United States courts. Rather, a lien is a mere "charge on [the] property," which "confers no general right of property." *Marine Midland Bank v. Marcal Enterprises, Inc.*, 398 N.Y.S.2d 782, 783 (N.Y. Co. Ct. 1977), *aff'd per curiam*, 407 N.Y.S.2d 833 (N.Y. App. Div. 1978); *see also* Restatement (First) of Property § 540, cmt. a (1944) (a lien is "merely additional security"); *Bertie's Apple Valley Farms v. United States*, 476 F.2d 291, 292 (9th Cir. 1973) (per curiam) (distinguishing between "title interest" in property as to which U.S. has not waived sovereign immunity and "lien interest"); *Terry Contracting Inc. v. State of New York*, 273 N.Y.S.2d 528, 532 (N.Y. Ct. Cl. 1966) ("[a] 'lien' is not a property in or right to the thing itself"), *rev'd on other grounds*, 280 N.Y.S.2d 450 (N.Y. App. Div. 1967).

This body of established U.S. domestic law at the time the FSIA was enacted strongly suggests that Congress intended to make a distinction between "rights in" real property and mere security interests (such as liens) when it enacted § 1605(a)(4). It is therefore not surprising that the Second Circuit failed to identify a single instance prior to the enactment of FSIA in which a court exercised jurisdiction over a foreign sovereign to adjudicate a dispute over the taxation of real property or the validity of a tax lien. The two state law cases upon which the court relied provide no support for its conclusion. In *Republic of Argentina*, the sovereign republic sued for, and won, a declaratory judgment that it was exempt from the City's

real estate tax and that the City's tax liens were void. 250 N.E.2d 698. The New York Court of Appeals agreed with Argentina and with the State Department that "under recognized principles of international law and comity the several states of the United States, as well as their political subdivisions, should not assess taxes against foreign government-owned property used for public noncommercial purposes." *Id.* at 700. Argentina waived its sovereign immunity from suit by "seeking affirmative benefit from the litigation," *i.e.*, a declaration that it was immune from taxation. *Aboujdid* v. *Singapore Airlines, Ltd.*, 494 N.E.2d 1055, 1059 (N.Y. 1986) (citing *De Sapio v. Kohlmeyer*, 321 N.E.2d 770, 772 (N.Y. 1974)). That the New York court accepted jurisdiction at Argentina's request provides no support for the Second Circuit's conclusion that "at the time of the FSIA's enactment, courts had jurisdiction to hear disputes such as this one" in which the City has sued unconsenting sovereigns to enforce a tax lien. App. 17 at n.12.

The Second Circuit's reliance on *United States v. City of Glen Cove*, 322 F. Supp. 149 (E.D.N.Y. 1971), was equally misplaced. In *Glen Cove*, the United States won an injunction barring the local government from imposing or enforcing a real estate tax against property of the Soviet Union's Mission to the United Nations. The Soviet Union was not a party to that lawsuit, and Glen Cove's loss scarcely supports the notion that the city could have sued the unconsenting Soviet Union to enforce its tax.[7]

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[7] *The Schooner Exch. v. M'Faddon*, 11 U.S. (7 Cranch) 116, 145 (1812), does not support the proposition that "when owning property here" a foreign state subjects itself to the same local laws and burdens as any other property owner. App. 16-17. The quoted

(Continued on following page)

The Second Circuit's decision in this case raises important questions concerning the proper interpretation of a U.S. statute intended to codify international law. Where, as here, the lower court relied on international conventions that the U.S. and the majority of European States have refused to sign while ignoring well-settled contemporaneous international law to create a very broad real property exception to a foreign state's sovereign immunity under § 1605(a)(4) that is unsupported by prior U.S. legal precedent, and is in fact in direct conflict with a sister circuit's ruling, this Court should grant review of the decision.

D. The Second Circuit Erroneously Used Present-Day Appropriations Bills to Interpret What Congress Intended When Enacting 28 U.S.C. § 1605(a)(4) in 1976

The Second Circuit also turned to appropriations laws that were enacted in 2004 and 2005, almost 30 years after the FSIA was written, to support its proposition that in 1976 Congress intended the "immovable property" exception to the FSIA to grant jurisdiction to U.S. courts to enforce a tax lien against a foreign sovereign's property used exclusively to support its diplomatic mission. App. 5-6. These appropriations laws require that 110 percent of unpaid property taxes owed by any country be withheld from that country's foreign aid, with the exact amount of taxes due to be determined "in a court order or judgment entered against such country by a court of the United

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passage *distinguishes* between property that a "prince" acquires as a personal investment and the property owned and used by a sovereign in its sovereign capacity.

States or any State or subdivision thereof." Foreign Operations, Export Financing, and Related Programs Appropriations Act of 2006, Pub. L. No. 109-102, 119 Stat. 2172, 2214-15, § 543 (2005); Consolidated Appropriations Act of 2005, Pub. L. No. 108-447, 118 Stat. 2809, 3011-12, § 543 (2004).

The Second Circuit's reliance on the two appropriations bills disregards this Court's repeated warning against using the "views of a subsequent Congress" to "infer[] the intent of an earlier one." *United States v. Price*, 361 U.S. 304, 313 (1960). This warning carries special force where appropriations bills are concerned. *See TVA v. Hill*, 437 U.S. 153, 190 (1973); *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 629 (1990) (O'Connor, J., joined by Rehnquist, C.J., Scalia & Kennedy, J.J., dissenting), *overruled on other grounds* by *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995). The effect of later appropriations bills on extant substantive legislation must be "construed narrowly." *Donovan v. Carolina Stalite Co.*, 734 F.2d 1547, 1558 (D.C. Cir. 1984) (Bork, J.) (citing *United States v. Langston*, 118 U.S. 389 (1886)). Moreover, there is no reason to read these appropriations bills, as the Second Circuit appears to have read them, as a congressional endorsement of New York City's construction of the "immovable real property" exception. It is a simple fact that the FSIA's exception for actions "based upon a commercial activity" provides an independent basis for jurisdiction to enforce a tax lien where some or all of a foreign sovereign's property has been used for commercial purposes. 28 U.S.C. § 1605(a)(2). As such, Congress's requirement to withhold a country's unpaid property taxes from foreign aid by no means requires or even suggests that the FSIA's "immovable property" exception

must encompass jurisdiction for actions to enforce a tax lien. The Second Circuit's attempt to rewrite statutory history with present-day appropriations bills is unsupportable and should not be allowed to stand.

CONCLUSION

For all the foregoing reasons, Petitioners respectfully request that the Supreme Court grant review of these cases.[8]

Dated: New York, New York
July 25, 2006

Respectfully submitted,

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[8] As we noted earlier, we respectfully suggest that this case is an appropriate case in which to invite the Solicitor General to express the views of the United States.

446 F.3d 365

United States Court of Appeals, Second Circuit.

The CITY OF NEW YORK, Plaintiff-Appellee,

v.

THE PERMANENT MISSION OF INDIA TO THE UNITED NATIONS and Bayaryn Jargalsaikhan, as principal resident representative to the United Nations of the Mongolian People's Republic, Defendants-Appellants, Great American Leasing Corporation and Jane Doe, The names of the last 20 defendants being unknown to the plaintiff, the persons or parties intended to be persons or corporations, if any, having or claiming an interest in or lien upon the property described in the complaint, Defendants.

Docket Nos. 05-4260-CV(L), 05-42639-CV(CON).

Argued: Jan. 23, 2006.

Decided: April 26, 2006.

Norman Corenthal, Assistant Corporation Counsel (Kristin M. Helmers and John Low-Beer, of counsel), for Michael A. Cardozo, Corporation Counsel of the City of New York, New York, N.Y., for Plaintiff-Appellee.

John J.P. Howley (Robert A. Kandel and Robert Grass, of counsel), Kaye Scholer LLP, New York, N.Y., for Defendant-Appellee.

Before: KATZMANN and HALL, Circuit Judges, KORMAN, District Judge.[1]

KATZMANN, Circuit Judge.

This case arises out of the City of New York's (the "City") attempts to collect property taxes from certain

[1] The Honorable Edward R. Korman, Chief United States Judge for the Eastern District of New York, sitting by designation.

foreign missions to the United Nations that have been using parts of their embassy buildings for purposes that, the City argues, render at least those portions of those buildings subject to property taxation. The merits of that claim are not before us in this interlocutory appeal. Instead, we are called upon to answer a preliminary question of first impression in this circuit – whether, pursuant to the "immovable property" exception to the Foreign Sovereign Immunity Act's general rule that a foreign country is immune from suit in our courts, a federal court has jurisdiction to settle this dispute. We agree with the district court that it does have such jurisdiction and that this suit may go forward. The decision of the district court is affirmed and this case remanded for further proceedings.

I.

A.

While the merits of the City's claim are not before us, we set forth a condensed version of the underlying dispute to give some context to the discussion that follows.

The Permanent Mission of India to the United Nations (the "Indian Mission") is housed in a 26-floor building at 235 East 43rd Street in New York City that is owned by the Government of India. The first six floors, basement, and cellar of this building are primarily used for diplomatic offices, while the top 20 floors are devoted to residential units. Housed in these units are 16 diplomatic employees of the mission (all below the rank of Head of Mission or Minister Plenipotentiary) and their families, as well as security personnel and a driver; all of these

employees are citizens of India who receive this housing rent-free.

The Ministry for Foreign Affairs of the People's Republic of Mongolia (the "Mongolian Mission") is housed in a 6-story building at 6 East 77th Street in New York City that is owned by the People's Republic of Mongolia. The first two floors apparently are used for the mission's offices and the third floor for the Ambassador's apartment. The top three floors are used for six apartments, in which reside, rent-free, lower-level employees of the mission and their families. Both missions assert that, for various reasons, the housing of diplomatic employees on-site is essential.

Under New York law, real property owned by a foreign government is exempt from taxation if it is "used exclusively" for diplomatic offices or for the quarters of a diplomat with the rank of ambassador or minister plenipotentiary to the United Nations. N.Y. Real Property Tax L. § 418. On the other hand, "[i]f a portion only of any lot or building . . . is used exclusively for the purposes herein described, then such portion only shall be exempt and the remainder shall be subject to taxation." *Id.* At least since 1993, the United States Mission to the United Nations ("U.S.Mission") has indicated its agreement that portions of property not used for the specific purposes stated above, including those portions used to house lower-level diplomatic employees, will be subject to property taxation, absent a contrary bilateral agreement between the United States and the country at issue.

In accordance with its interpretation of this state law and applicable treaties, the City has been levying property taxes against the two properties in question for years, but

has had no success in getting the missions to pay. By operation of New York law, these unpaid taxes eventually converted into tax liens held by the City against these two properties. The City alleges that, as of February 1, 2003, the Indian Mission property was subject to about $16.4 million in unpaid property taxes and interest, while the Mongolian Mission owed about $2.1 million.

B.

On April 2, 2003, the City filed separate complaints in state court seeking judgments establishing the validity of the tax liens on the mission buildings.[2] Both missions (represented by the same counsel) removed their cases to federal court, where both cases were assigned to Judge Casey. After discovery limited to the jurisdictional question, the missions moved to dismiss for lack of subject matter jurisdiction.

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[2] Two other countries were also sued in this high-profile action. The City claimed that Turkey owed $70 million and that the Philippines owed $17.7 million. *See* Thomas J. Lueck, Bloomberg Sues 4 Countries, Saying They Owe City $100 Million, N.Y. Times, 4/10/03, at D3. Turkey, which the City alleged had rented out part of its consulate to the Bangladesh Mission, settled for $6 million. *See* Joanne Wasserman, City Plucks 6M in Taxes From Turkey, N.Y. Daily News, 10/1/03, at 19. Meanwhile, the case against the Philippines, which was also assigned to Judge Casey, has proceeded to summary judgment on the merits, because the Philippines chose not to join the instant motion to dismiss. *See City of New York v. Republic of the Philippines*, 03-cv-6085, 2004 WL 2710026 (S.D.N.Y.2004) (RCC). We are not aware of any other pending actions of this nature, but the City has publicly named other embassies as offenders, and so may well seek to initiate further proceedings if successful here. *See* William Sherman and Bob Port, A Towering Slap in City's Face, N.Y. Daily News, 10/24/04, at 4 (citing Hungary, Guinea, Nepal, and Nigeria in addition to the countries already mentioned).

In a thoughtful, well-researched opinion dated July 6, 2005, Judge Casey denied the motions on the ground that these suits implicate the "immovable property" exception to the Foreign Sovereign Immunity Act's ("FSIA") general rule that foreign governments are immune from suit. *See City of New York v. Permanent Mission of India to the United Nations,* 376 F.Supp.2d 429 (S.D.N.Y.2005). He did not reach the City's alternative argument that the suits also implicate the FSIA's "commercial activity" exception.[3] This interlocutory appeal followed. *See Transatlantic Shiffahrtskontor GmbH v. Shanghai Foreign Trade Corp.,* 204 F.3d 384, 387 (2d Cir.2000) (immediate appeal is permitted, pursuant to the collateral-order doctrine, of denial of motion to dismiss for lack of subject matter jurisdiction under the FSIA).

Meanwhile, Congress has been actively involved in the issues directly pertaining to this litigation. Provisions included in appropriations bills enacted in each of the past two years require that 110 percent of unpaid property taxes owed by any country be withheld from that country's foreign aid. For unpaid property taxes to be subject to this withholding requirement, however, the amount owed must be determined "in a court order or judgment entered against such country by a court of the United States or any State or subdivision thereof." Foreign Operations,

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[3] This exception provides that a foreign state shall not be immune from jurisdiction in any case "in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States." 28 U.S.C. § 1605(a)(2).

Export Financing, and Related Programs Appropriations Act of 2006, P.L. No. 109-102, § 543 (2005); Consolidated Appropriations Act of 2005, P.L. No. 108-447, § 543 (2004). Thus, this provision cannot be triggered if no court can adjudicate the property tax controversy.

II.

A.

Against this backdrop, we begin by noting that we review *de novo* the district court's conclusions of law regarding jurisdiction under the FSIA.[4] *Cabiri v. Gov't of the Republic of Ghana,* 165 F.3d 193, 196 (2d Cir.1999).

The FSIA provides "the sole basis for obtaining jurisdiction over a foreign state in federal court." *Argentine Republic v. Amerada Hess Shipping Corp.,* 488 U.S. 428, 439, 109 S.Ct. 683, 102 L.Ed.2d 818 (1988). Under the FSIA, a foreign state is presumptively immune from suit. *Saudia* [sic] *Arabia v. Nelson,* 507 U.S. 349, 355, 113 S.Ct. 1471, 123 L.Ed.2d 47 (1993). However, the FSIA contains several exceptions to this general rule of immunity. The party seeking to establish jurisdiction bears the burden of producing evidence establishing that a specific exception to immunity applies, but the foreign state then bears the ultimate burden of persuasion on this question. *See Virtual Countries, Inc. v. Republic of South Africa,* 300 F.3d 230, 241 (2d Cir.2002); *Cargill Int'l S.A. v. M/T Pavel Dybenko,* 991 F.2d 1012, 1016 (2d Cir.1993)

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[4] While we review for clear error any factual findings made by the district court, *see Shapiro v. The Republic of Bolivia,* 930 F.2d 1013, 1016 (2d Cir.1991), it does not appear that the district court resolved any material factual disputes.

B.

In this case, the City argues that jurisdiction lies under the FSIA's "immovable property" exception. This exception provides that a foreign state shall not be immune from jurisdiction in any case in which "rights in immovable property situated in the United States are in issue." 28 U.S.C. § 1605(a)(4). The parties take very different stances on how expansive this exception is. The defendants argue that the immovable property exception is limited to cases in which the parties dispute title, ownership or possession of the immovable property itself. The City argues that the exception extends much more broadly, including to actions to adjudicate the validity of a tax lien. This is a question of first impression in this circuit.

We begin, as always, with the language of the provision. *See, e.g., United States v. Gayle,* 342 F.3d 89, 92 (2d Cir.2003); *United States v. Velastegui,* 199 F.3d 590, 594 (2d Cir.1999), cert. denied, 531 U.S. 823, 121 S.Ct. 67, 148 L.Ed.2d 32 (2000). Its general parameters are clear in two respects, neither of which is disputed by either party. First, it is restricted to "immovable property situated in the United States," *i.e.,* real estate located in this country. Second, its application is limited to cases in which rights in such real estate "are in issue." Thus, it does not apply to disputes that arise out of such rights in real estate but do not actually place them at issue. *See Asociacion de Reclamantes v. The United Mexican States,* 735 F.2d 1517, 1523 (D.C.Cir.1984) (Scalia, J.).

What is controverted here is what is meant by "rights in" immovable property. Textually, we find that this phrase is more plausibly read to support the City's position than

the defendants'. By its terms, the provision does not limit itself to cases in which the specific right at issue is title, ownership, or possession, and it certainly does not specifically exclude cases in which the right at issue is a lien.[5] Nor does the plain language restrict this provision to cases where the *foreign government's* rights in the property are in issue, as defendants suggest; a purely textual analysis suggests that it would suffice that the City's rights in the property (which are simply the flip side of the defendants' obligations with respect to the property) are in dispute. However, the text also does not explicitly confirm the City's position, and we find it sufficiently ambiguous that an investigation of the legislative history is in order. *See Gayle,* 342 F.3d at 93-94 ("Resort to authoritative legislative history may be justified where there is an open question as to the meaning of a word or phrase in a statute, or where a statute is silent on an issue of fundamental importance to its correct application.").

Until the middle of the last century, the United States followed what is known as the "classical or virtually absolute theory of sovereign immunity," the animating principle of which was that "a sovereign cannot, without his consent, be made a respondent in the courts of another sovereign." *See* Letter from Jack B. Tate of May 19, 1952,

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[5] Defendants argue that liens are not rights in real estate at all, but merely "security interests." We find this argument unconvincing; a security interest is certainly a different type of right than, say, a possessory or ownership interest, but it remains nonetheless a species of "right" as that term is generally understood in the legal system. *See* Black's Law Dictionary 1347 (8th ed.1999) (one definition of "right" is "[t]he interest, claim or ownership that one has in tangible or intangible property"); *id.* at 941 (defining a "lien" as a "legal right or interest that a creditor has in another's property").

26 Dep't of State Bull. 984 (1952) (the "Tate Letter"), reproduced in *Dunhill v. Republic of Cuba*, 425 U.S. 682, 712, 96 S.Ct. 1854, 48 L.Ed.2d 301 (1976). In 1952, the Tate Letter announced the United States' decision to join most other countries in switching to the so-called "restrictive theory" of sovereign immunity, under which "the immunity of the sovereign is recognized with regard to sovereign or public acts (*jure imperii*) of a state, but not with respect to private acts (*jure gestionis*)." *Id.* at 711, 96 S.Ct. 1854. It is clear from the legislative history and settled in our caselaw that Congress's intent in enacting the FSIA was to largely codify the restrictive theory of sovereign immunity set forth in the Tate Letter. *See* H.R. Rep. 94-1487 (1976) (the "House Report"), reprinted at 1976 U.S.C.C.A.N. 6604, 6605; *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 612, 112 S.Ct. 2160, 119 L.Ed.2d 394 (1992). Applying the general principle that animates the Tate Letter and, thus, the FSIA itself – immunity is available only where a state is acting in a sovereign capacity, and not with respect to a state's "private acts" – we think ownership of real estate in a foreign country must be considered the latter, because ownership itself is not inherently a sovereign act.

With respect to the specific issue confronting us, the Tate Letter says only: "There is agreement by proponents of both [the classical and the restrictive] theories, supported by practice, that sovereign immunity should not be claimed or granted in actions with respect to real property (diplomatic and perhaps consular property excepted)." Tate Letter at 711. Defendants argue that this passage in the Tate Letter (assumed to be adopted by the FSIA) precludes jurisdiction for cases involving diplomatic property. However, as actually codified in the FSIA, the

diplomatic property exception applies only to protect property used for such purposes from attachment or execution following a judgment. *See* 28 U.S.C. § 1610(a)(4)(B) (stating that immovable property situated in United States is subject to attachment, "*Provided,* That such property is not used for purposes of maintaining a diplomatic or consular mission or the residence of the Chief of such mission"). Thus, it is quite clear from the text that the FSIA does not bar jurisdiction, but does bar certain remedies, on the basis of a property's diplomatic status.[6]

This understanding is confirmed by reliable legislative history. In general, the House Report restates the immovable property exception in terms as broad as, or even broader than, those used in the text itself. *See* House Report at 6618 (provision "denies immunity in litigation relating to rights in real estate"). In addition, it confirms that consideration of a property's diplomatic status takes place with respect to available remedies, not with respect to jurisdiction. *See id.* at 6619 ("Actions short of attachment or execution [of the diplomatic property] seem to be

[6] This does not mean that the FSIA is in conflict with the Tate Letter on this point, because the Tate Letter referenced not simply the jurisdictional aspects of sovereign immunity codified in the FSIA but also the invocation of sovereign immunity as a defense on the merits, where diplomatic property receives some degree of special protection. In particular, the Vienna Convention on Diplomatic Relations, to which the United States is a party, states: "The sending State and the head of the mission shall be exempt from all national, regional or municipal dues and taxes in respect of the premises of the mission, whether owned or leased, other than such as represent payment for specific services rendered." Vienna Convention on Diplomatic Relations, 23 U.S.T. 3227, Art. 23, § 1 (1972). Undoubtedly, the parties will have differing interpretations of what protections this provision offers defendants, but that is a question for the merits, not of jurisdiction under the FSIA.

permitted under the [Vienna Convention on Diplomatic Relations], and a foreign state cannot deny to the local state the right to adjudicate questions of ownership, rent, servitudes, and similar matters, as long as the foreign state's possession of the premises is not disturbed.").[7]

Moreover, the narrow interpretation of the immovable-property exception put forward by defendants is difficult to square with Congress's explicit reliance on the courts to adjudicate the property tax liabilities of foreign governments. *See* Foreign Operations, Export Financing, and Related Programs Appropriations Act of 2006, P.L. No. 109-102, § 543 (2005); Consolidated Appropriations Act of 2005, P.L. No. 108-447, § 543 (2004) (requiring that amount owed be determined "in a court order or judgment entered

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[7] We do not address today the potential significance of this statement in the House Report with respect to any remedy that the City might seek if successful on the merits, and so it is unnecessary at this stage of the litigation to explore the extent to which a lien is "similar" to ownership, rent, or a servitude. With respect to the rights that can be adjudicated – the question now before us – we disagree with defendants' assertion that this statement limits the rights that can be at issue with respect to diplomatic property to "questions of ownership, rent, servitudes, and similar matters." There is no indication that the drafters of the House Report meant this passage as such a limitation; rather, read in context, it was intended to make clear that any actions that do not disturb a foreign state's possession of the premises are permitted, up to and including suits involving questions of ownership. We observe that the defendants' interpretation has no corollary in the text actually adopted by Congress, which imposes no such limitations on the types of property rights that permit jurisdiction and addresses the subject of diplomatic property only with respect to available remedies, not with respect to available rights. *See York River House v. Pakistan Mission to the United Nations*, 1991 WL 206286, 1991 U.S. Dist. LEXIS 13683 (S.D.N.Y.1991) (Leval, J.) (finding that this legislative history could not overcome fact that statutory language contained "neither a clear assertion of, nor even an ambiguous reference to, such an exception").

against such country by a court of the United States or any State or subdivision thereof" before it is withheld from foreign aid). Here, adoption of the defendants' proposed interpretation of FSIA would make dead letters out of Congress's recent enactments, which were intended to address the exact controversy before us today, because no court could provide the adjudication required to trigger them. We do not lightly reach such a result, and certainly will not do so where nothing in the statutory language or legislative history remotely requires it.

Finally, because the FSIA was intended to codify an already existing practice of following the restrictive theory of sovereign immunity, and because that policy was itself meant to bring the United States into conformity with other countries that had already adopted or were in the process of adopting the restrictive theory, it is instructive to look at contemporaneous expressions of the content of this exception to sovereign immunity for actions involving real property owned by the foreign state. *See Reclamantes,* 735 F.2d at 1521. First, the Restatement (Second) of Foreign Relations Law of the United States, the most recent restatement at the time of the FSIA's adoption, states that a foreign state's immunity does not extend to "an action to obtain possession of or establish a property interest in immovable property located in the territory of the State exercising jurisdiction." Restatement (Second) of Foreign Relations Law of the United States § 68(b) (1965). Thus, at the time of the FSIA's adoption, any action to

"establish a property interest in immovable property" was permissible.[8]

Second, the European Convention on State Immunity, which was drafted in 1972 and ratified in 1976, just prior to the enactment of the FSIA, states:

> A Contracting State cannot claim immunity from the jurisdiction of a court of another Contracting State if the proceedings relate to: (a) its rights or interests in, or its use or possession of, immovable property; or (b) its obligations arising out of its rights or interests in, or use or possession of, immovable property and the property is situated in the territory of the State of the forum.

European Convention on State Immunity, May 16, 1972, ETS No. 74 ("European Convention"), art. 9. The European understanding – presumably known to the drafters of the FSIA – was that this exception covered a broad range of suits, including those arising out of the foreign state's obligations stemming from its ownership of property.

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[8] Defendants make much of comment d to this rule, which states that the rule "does not preclude immunity with respect to a claim arising out of a foreign state's ownership or possession of immovable property but not contesting such ownership or the right to possession." They argue that this indicates that the exception is limited to cases contesting ownership or possession. However, the illustrations to this comment make clear that it does not limit the types of interests that can be involved, but rather clarifies that those rights must actually be "in issue," to use the language with which the FSIA codified this understanding. For example, the Restatement (Second) notes, a state can bring a proceeding in eminent domain to condemn real property owned by a foreign state. By contrast, the immovable property exception does not preclude immunity in a suit brought by a plaintiff who is injured on the defendant's property. *See* Restatement (Second) § 68 comment d (1965).

Of course, we must take note that Congress elected not to use the far more detailed language of the European Convention. Yet nothing in the vague but broad formulation used in the FSIA ("rights in immovable property situated in the United States are in issue") precludes its interpretation as synonymous to the European Convention's version. The European Convention version is split into two prongs, the first covering the foreign state's rights in the immovable property and the second addressing the state's obligations arising out of its ownership of property. Congress did not simply adopt language tracking the first prong, and thereby limit the reach of the immovable-property exception to cases in which the foreign state's rights in the property are at issue, but rather passed a provision that does not specify whose rights must be at issue. As indicated, *supra,* we think this provision therefore is most naturally read to cover not only the foreign state's rights in the property but also its obligations, *i.e.*, rights retained in the property by the local state or another party.

Shortly after the FSIA's passage, the International Law Commission (the "ILC") began work on what is now known as the United Nations Convention on Jurisdictional Immunities of States and Their Property (the "U.N. Convention"). In 1983, it finalized its version of the immovable property exception, which largely tracks the European Convention's version.[9] At that time, the United

[9] Specifically, it says a state cannot invoke immunity "in a proceeding which relates to the determination of: (a) any right or interest of the State in, or its possession or use of, or any obligation of the State arising out of its interest in, or its possession or use of, immovable property situated in the State of the forum." U.N. Convention art. 13.

States member of the ILC stated his understanding that "[t]his article embodies the 'exception' to state immunity that is contained in [the FSIA] but is considerably more detailed." Stephen C. McCaffrey, *The Thirty-Fifth Session of the International Law Commission*, 78 Am. J. Int'l L. 457, 465 (1984). On December 2, 2004, after two decades of negotiations over the wording of other, more contentious provisions such as the "commercial activity" exception, the United Nations General Assembly adopted the U.N. Convention. *See* David P. Stewart, *The UN Convention on Jurisdictional Immunities of States and Their Property*, 99 Am. J. Int'l L. 194, 194 (2005) (hereinafter, "Stewart, The UN Convention"). While expressing some concern about other provisions, the U.S. Mission applauded the U.N. Convention's exception for "claims with respect to rights or interests in real property within that foreign State," one of the exceptions that it declared "are widely recognized" and "have worked well." Statement by Eric Rosand, Deputy Legal Counselor, United States Mission to the United Nations, Oct. 25, 2004.[10]

Not only did the ILC draft a broad and detailed version of the immovable property exception, it gave a coherent account of why such an exception has always been recognized, even under the absolute theory of sovereign immunity. The acquisition and continued ownership of property in a foreign country "is made possible only by virtue of the application of the internal law or private law

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[10] By its terms, the U.N. Convention will go into force once 30 countries ratify it. As of September 30, 2005, 17 countries had done so. *See* http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterIII/treaty38.asp. United States ratification is considered somewhat unlikely, for reasons wholly apart from the matter of the immovable property exception. *See* Stewart, The UN Convention, at 211 & n. 93.

of the State of the *situs*." International Law Commission, Documents of the Thirty-Fifth Session, II Y.B. Int'l L. Comm'n 47, U.N. Doc. A/CN.4/363 and Add.1 [1983]. Because ownership itself is only possible through the operation of local law, "[t]he outside State or extraterritorial State as an outsider must, from the start, fully recognize and respect the local or territorial internal law which unquestionably governs the legal relationship between the foreign State and the property so acquired." *Id.*

As the district court aptly put it:

> Foreign governments own, use, and possess land subject to the unique regulations of the forum jurisdiction; their property rights derive from, and are protected by, that regime. . . . [D]efendants purchased the land subject to New York's property law, including real-estate taxes and liens to enforce them.

City of New York, 376 F.Supp.2d at 435. We agree. Ownership of property connotes a bundle of related rights and obligations defined by local property law. A foreign state cannot assume the benefits of ownership – including the right to exclude others from the property with the assistance of the local government and, significantly, the right to sue those who violate its rights – while simultaneously disclaiming the obligations associated with them. When owning property abroad, a foreign state must follow all the same laws that pertain to private owners of such property, except to the extent that it can point to specific exceptions in that country's agreements with the United States, treaties, or other sources of law.[11] This principle – when

[11] Once again, whether and to what extent those rules apply and immunize the defendants from property taxation is a question for the

(Continued on following page)

owning property here, a foreign state must follow the same rules as everyone else – long predated the restrictive theory of sovereign immunity and the FSIA. *See The Schooner Exch. v. M'Faddon,* 7 Cranch 116, 11 U.S. 116, 145, 3 L.Ed. 287 (1812) ("A prince, by acquiring private property in a foreign country, may possibly be considered as subjecting that property to the territorial jurisdiction; he may be considered as so far laying down the prince, and assuming the character of a private individual."). We see no evidence that the FSIA was meant to alter it.[12]

We conclude that the "immovable property" exception to foreign sovereign immunity should be construed to include any case where what is at issue is: (1) the foreign country's rights to or interest in immovable property situated in the United States; (2) the foreign country's use or possession of such immovable property; or (3) the

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district court to consider on the merits, not a jurisdictional bar from suit under the FSIA.

[12] In particular, at the time that the FSIA was enacted, the New York legislation at issue in this case was already in place, a fact that surely was known to the FSIA's drafters. Indeed, in a case that likely will be discussed at length as this action reaches the merits, the New York Court of Appeals had recently held that international law (including treaties to which the United States was a party) limited the City's ability to collect property taxes from foreign governments. *See Republic of Argentina v. City of New York,* 25 N.Y.2d 252, 303 N.Y.S.2d 644, 250 N.E.2d 698 (N.Y.1969). In doing so, the state court observed that the United States, while then advancing the position that the City's ability to tax should be limited, explicitly disclaimed the position that the court did not have the authority to make its own determination as to the applicability of international law to the facts of the case. *Id.* at 258 & n. 1, 303 N.Y.S.2d 644, 250 N.E.2d 698. It thus seems clear that, at the time of the FSIA's enactment, courts had jurisdiction to hear disputes such as this one. *See also United States v. Glen Cove,* 322 F.Supp. 149, 153 (E.D.N.Y.1971) (finding federal jurisdiction to hear dispute over city's taxation of property owned by foreign government).

foreign country's obligations arising directly out of such rights to or use of the property.[13] We think this interpretation is the most consistent with the broad, albeit vague, language of the provision itself, as well as with the FSIA's general principle of withdrawing sovereign immunity where states act in the same manner as private actors. In addition, it gives effect to the intent of the FSIA's drafters "to bring American sovereign immunity practice into line with that of other nations." *Texas Trading & Milling Corp. v. Fed. Republic of Nigeria,* 647 F.2d 300, 310 (2d Cir.1981).

While this is our circuit's first opportunity to construe the immovable property exception, several of our sister circuits have done so before us. The first and most comprehensive of these opinions, *Reclamantes,* authored by then-D.C. Circuit Judge Antonin Scalia, rejected a claim by the successors in interest to the recipients of land grants from Mexico who were driven from their land by the United States and Texas in the period following the *Mexican-American War.* 735 F.2d at 1519. These plaintiffs claimed that, as a result of various subsequent events, Mexico had assumed the responsibility for compensating them for their lost land but had not done so. *Id.* at 1519. After recognizing that the plain language of the immovable property exception was "imprecise," *Reclamantes* delved into the legislative history and concluded, as we do, that the immovable property exception was enacted to

[13] Such obligations include only those imposed by the local government as part of its property law regime, and do not include standard tort liability. The FSIA contains a separate exception to immunity for suits arising out of "tortious act[s]" committed by foreign states and their employees. *See* 28 U.S.C. § 1605(a)(5).

codify "the pre-existing real property exception to sovereign immunity recognized by international practice." *Id.* at 1521. Under international practice at the time of the FSIA's enactment, the real property exception was "limited to disputes directly implicating property interests or rights to possession." *Id.* at 1522. By contrast, the *Reclamantes* plaintiffs' claims for compensation were not "property interests in real estate, such as a leasehold, easement or servitude, nor possessory rights, nor even rights to payment of money secured by an interest in land." *Id.* at 1523. The involvement of real property in the suit was "purely of historical interest, having no bearing upon present property interests." *Id.* at 1523.

We agree with the holding of *Reclamantes, i.e.,* that the immovable property exception is limited to disputes directly implicating present property interests,[14] as well as

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[14] Following *Reclamantes,* two other panels have denied jurisdiction under the immovable property exception on the ground that the disputes did not directly implicate present real property interests because the plaintiffs sought only money damages and not any adjudication of property rights. In *MacArthur Area Citizens Ass'n v. Republic of Peru,* 809 F.2d 918 (D.C.Cir.1987), a citizens' association alleged that the Republic of Peru had violated local zoning laws in remodeling a building for use as a chancery. The suit originally sought both injunctive relief and damages, but before any court could rule on the jurisdictional question, Peru voluntarily vacated the premises. As the suit stood by the time it reached the D.C. Circuit, the citizens' association did not seek to establish any rights in real estate, but rather sought damages in what was essentially a garden-variety tort claim, *Republic of Peru* found: "Upon analysis, the Association's complaint sounds not in the law of real property at all, but the law of nuisance." *Id.* at 921.

A similar situation pertained in *Fagot Rodriguez v. Republic of Costa Rica,* 297 F.3d 1 (1st Cir.2002), where plaintiffs, who had rented a house to the Consul and Vice-Consul of the Republic of Costa Rica, sued over non-payment of rent and sought to evict the diplomats. By the time the case reached judgment, however, the defendants had vacated

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the methodology it employed (looking at international practice around the time of the FSIA's enactment). Moreover, we agree with *Reclamantes*' suggestion in dicta that a broad range of property interests (including a security interest) can satisfy the exception. While *Reclamantes* had no occasion to specify with precision the types of property interests that would qualify, and so did not consult the international sources that we have consulted to provide a more detailed and workable standard, we think our holding today is entirely consistent with that case, and indeed builds upon the groundwork it laid.[15]

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the premises, leaving only a dispute about unpaid rent and other damages. Accordingly, *Republic of Costa Rica* concluded, what was left was "a simple contract dispute over nonpayment of rent," jurisdiction over which would usually be provided by the commercial-activity exception instead. *Id.* at 12-13.

As we read *Republic of Peru* and *Republic of Costa Rica*, they are cases about what it means for a property interest to actually be "in dispute." They thus spend little time exploring, and can tell us little about, what sorts of property interests would qualify. We neither express any opinion as to the correctness of their holdings (because there is no question that in the instant case the property interest involved is actually in dispute) nor attach much significance to their dicta regarding the types of property interests contemplated by the drafters of the FSIA.

[15] By contrast, we decline to adopt the reasoning of *City of Englewood v. Socialist People's Libyan Arab Jamahiriya*, 773 F.2d 31 (3d Cir.1985), which involved facts very similar to those of this case. In that case, the New Jersey city of Englewood attempted to tax a parcel of real estate Libya used as a "weekend retreat" for its Head of Mission to the United Nations and his immediate family and guests. *Id.* at 33. *City of Englewood* simply recharacterized the immovable property exception as a "title dispute exception." *Id.* at 36. Because "[n]o one disputes Libya's title to the Englewood premises or its right to exclude others from possession thereof," it concluded, the exception did not apply. While the City attempts to distinguish *City of Englewood* based on differing details of New York and New Jersey tax law, there is no indication that *City of Englewood* took such considerations into account. Rather than

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C.

Applying the standard we have described above to the facts of this case is simple. What is in dispute in this case is the extent of defendants' obligations under local law (here, property taxes) arising directly out of their ownership of real property in the United States.[16] The immovable property exception thus provides jurisdiction over this matter. Having reached this conclusion, like the district court, we decline to decide whether the commercial-activity exception is also implicated on these facts.

Although our conclusion is based on conventional methods of statutory interpretation, because of the politically sensitive nature of this case, we also have carefully considered the defendants' and the United States' arguments sounding in public policy and find that we are not persuaded.[17] In particular, we do not agree that our holding

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try to distinguish *City of Englewood*, we respectfully find it unpersuasive, in light of our prior discussion.

[16] The fact that the defendants' alleged obligations have converted into tax liens, and that this action thus seeks a declaration of the liens' validity in addition to a declaration of the defendants' underlying tax liability, is irrelevant to our analysis. We agree with the defendants that the City cannot use the device of a lien to create jurisdiction where none would otherwise lie, but we would reach the same result had this action been filed purely to obtain a declaratory judgment regarding defendants' property tax liability. Moreover, in simply affirming the district court's jurisdiction to hear this matter, we express no opinion as to whether a tax lien may be placed on diplomatic property.

[17] We note that the United States did not on its own initiative file a statement of interest, as it might have done, pursuant to 28 U.S.C. § 517. Rather, after briefing and argument by the parties, we solicited and have carefully considered the opinion of the United States in this matter, because the executive branch's views on matters implicating relations with foreign states are entitled to consideration. *See Republic of Austria v. Altmann*, 541 U.S. 677, 701, 124 S.Ct. 2240, 159 L.Ed.2d 1

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permits the City and other litigants to use creative pleading to "bootstrap" claims against foreign governments that otherwise would find no jurisdiction under the FSIA into exercises of the immovable property exception. The rule of *Reclamantes* – the dispute in question must actually arise directly out of the property interest in question – makes such fears groundless.

The instant dispute appears to revolve around the proper interpretation of a treaty (the Vienna Convention

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(2004). However, "interpretation of the FSIA's reach [is] a pure question of statutory interpretation" that is "well within the province of the Judiciary," and so the United States' views "merit no special deference." *Id.* Indeed, among the purposes of the FSIA were relieving the executive branch of the responsibility of case-by-case application of the restrictive theory of sovereign immunity and assuring litigants that their cases would be decided according to the pure application of law rather than in accordance with diplomatic pressures. *See Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 488, 103 S.Ct. 1962, 76 L.Ed.2d 81 (1983). It is particularly inappropriate to defer to the executive branch's legal views here because its position as to the proper scope of the immovable-property exception is inconsistent with its previous interpretation. As the United States acknowledges, the Department of Justice filed an amicus brief in 1985 in *City of Englewood v. Socialist People's Libyan Arab Jamahiriya*, 773 F.2d 31 (3d Cir.1985), arguing that the immovable property exceptions of Section 1605(a)(4) and of the European Convention were consonant with each other and that property tax liens implicated the FSIA's immovable property exception. We have, however, looked carefully at the United States' brief statement of potential foreign policy concerns associated with the assertion of jurisdiction in this case. While such concerns could perhaps merit a dismissal on other facts, *cf. Garb v. Republic of Poland*, 440 F.3d 579, 584 & n. 6 (2d Cir.2006); *Whiteman v. Dorotheum GmbH & Co. KG*, 431 F.3d 57, 59-60 (2d Cir.2005), we find none of the cited issues, presented in a largely vague and speculative manner, potentially severe enough or raised with the level of specificity required to justify presently a dismissal on foreign policy grounds. In the course of the proceedings remanded to the district court, the United States is, of course, free to file a further statement of interest if it thinks developments so warrant.

on Diplomatic Relations) and the application of that treaty to these facts. The Supreme Court has made clear that such a controversy is well within the competence and authority of the federal courts and is not a non-justiciable political question. *See Japan Whaling Ass'n v. Am. Cetacean Soc'y,* 478 U.S. 221, 230, 106 S.Ct. 2860, 92 L.Ed.2d 166 (1986) (stating that "the courts have the authority to construe treaties"); *Baker v. Carr,* 369 U.S. 186, 211, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962) ("[I]t is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance."). Leaving such construction to the courts does not threaten the United States' compliance with international protections for diplomatic property; rather, the alternative – granting dismissal for want of jurisdiction whenever a defendant can raise a plausible claim of the treaties' applicability – could effectively expand the treaties' scope. In addition, Congress has specifically given to the courts – by way of a bill signed into law by the President – the role of deciding what property taxes are due from federal governments.[18]

We emphasize once again that the merits of this dispute are not before us. We express no opinion as to whether the City is correct that it may levy property taxes on those portions of embassy buildings that are used to house lower-level diplomatic employees. Nor do we express any opinion today as to what sorts of remedies will be available to the City should it prevail on its claim. Rather,

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[18] The United States suggests in passing that certain international fora may be more appropriate than our domestic courts for adjudication of controversies of this nature. No motion has been made to transfer this case to any other tribunal, and we express no opinion as to whether such a motion would have merit.

we hold only that the district court was correct in finding that it had jurisdiction to hear the controversy.

III.

Accordingly, the opinion of the district court is affirmed, and this case is remanded for further proceedings.

376 F.Supp.2d 429

United States District Court, S.D. New York.
THE CITY OF NEW YORK, Plaintiff,
v.
THE PERMANENT MISSION OF INDIA TO THE UNITED NATIONS, Greatamerica Leasing Corporation, and "Jane Doe # 1" through "Jane Doe # 20", the names of the last 20 defendants being unknown to plaintiff, the person or parties intended to be, persons or corporations, if any, having or claiming an interest in or lien upon the property described in the complaint, Defendants.
The City of New York, Plaintiff,
v.
The Bayaryn Jargalsaikhan, as Principal Resident Representative to the United Nations of the Mongolian People's Republic, and "Jane Doe # 1" through "Jane Doe # 20", the names of the last 20 defendants being unknown to plaintiff, the person or parties intended to be, persons or corporations, if any, having or claiming an interest in or lien upon the property described in the complaint, Defendants.
Nos. 03 CIV. 3256(RCC), 03 CIV. 6086(RCC).

July 7, 2005.

Michael A. Cardozo, New York City, for Plaintiff.

John J.P. Howley, Robert A. Kandel, Robert Negron Jr., Kaye Scholer, LLP, New York City, for Defendants.

MEMORANDUM & ORDER

CASEY, District Judge.

In these actions the City of New York ("City") seeks declaratory judgments that it has valid tax liens against two properties in Manhattan – one owned by the Permanent

Mission of India to the United Nations ("India") and the other by the Bayaryn Jargalsaikhan as the Principal Resident Representative of the Mongolian People's Republic to the United Nations ("Mongolia") – as a result of unpaid real-property taxes, other charges, and interest. India and Mongolia ("Defendants") have moved to dismiss the complaints against them on the ground that they are immune from suit under the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. § 1604. On what appears to be a matter of first impression in this Circuit, the Court concludes that India and Mongolia are not immune from suit because rights in immovable property situated in the United States are in issue. Accordingly, Defendants' motions are **DENIED**.

I. BACKGROUND

India and Mongolia use their respective properties as office and residential space related to their Missions to the United Nations. Since 1993, India has used the first six floors, basement, and cellar of its property for Mission offices and accessory space. (Ruchira Kamboj Aff. ¶ 3.[1]) Floors seven through twenty-six contain residential apartments, in which Mission diplomats and their families reside. (*Id.* ¶¶ 3-4.) Security personnel and a driver are housed on the seventh floor. (*Id.* ¶ 5.) No resident of the building pays rent or other costs of housing. (*Id.* ¶ 7.) Mongolia has used its premises for Mission office and residential space since 1980. (*See* Gansukh Purevjav Aff.

[1] Although a court is ordinarily confined to the pleadings in deciding a motion to dismiss, it may consult affidavits when the motion is directed to the court's subject matter jurisdiction. *See Gualandi v. Adams*, 385 F.3d 236, 244 (2d Cir.2004).

¶ 3.) The six-story building provides offices and housing for the Ambassador-Permanent Representative to the United Nations, four other diplomats, and an administrative officer and driver. (*Id.* ¶ 2.)

The City contends that Defendants must pay real-property taxes on those portions of the buildings that are used neither as Mission office space nor as an official residence for the countries' resident representatives to the United Nations with rank of ambassador or minister plenipotentiary. The City alleges that floors seven through twenty-six of India's premises are taxable because they are used exclusively as residences for staff below the rank of ambassador. India allegedly owes $16,376,702.09 in unpaid real-estate taxes, other charges, and interest accrued as of January 31, 2003. Mongolia allegedly has failed to pay $2,068,995.00 in real-estate taxes and interest accrued as of January 31, 2003. The sums sought stem from Mongolia's use of the fourth and fifth floors of its premises as residential space for staff ranking below the Mongolian Ambassador to the United Nations.

New York law requires the payment of real-estate taxes on portions of foreign-government property that is not "used exclusively for the purposes of maintaining offices or quarters, for [the principal resident representative or resident representative with the rank of ambassador or minister plenipotentiary], or offices for the staff of such representatives." N.Y.Real Prop. Tax Law § 418(1). New York law further provides, "If a portion only of any lot or building of any such [foreign] government or [principal resident] representative is used exclusively for the purposes herein described, then such portion only shall be

exempt and the remainder shall be subject to taxation unless otherwise exempt from taxation by law."[2] *Id.*

The City originally brought suit in New York State Supreme Court to enforce payment of the unpaid taxes assessed against those portions of the buildings alleged not to be exempt from taxation under the New York Real Property Tax Law. Defendants removed the cases to this Court pursuant to 28 U.S.C. § 1441(d), which provides for removal by a foreign state of any suit brought against it in state court. After jurisdictional discovery, Defendants moved to dismiss the suits against them for lack of subject matter jurisdiction. The Court received consolidated briefing and argument on the motions, which address the identical issue: whether this Court has jurisdiction under the FSIA to eventually adjudicate the validity of the tax liens.

II. DISCUSSION

The FSIA provides the sole basis for a court in the United States to exercise subject matter jurisdiction in a

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[2] The parties debate the application of the Vienna Convention on Diplomatic Relations, Apr. 18, 1961, 23 U.S.T. 3227, TIAS 7502, to the issue of immunity from taxation. The parties agree, however, that the Court cannot reach that issue unless it has subject matter jurisdiction, and that the question of subject matter jurisdiction must be answered with reference to the FSIA and not the Vienna Convention. The defendants have not challenged the complaints on the merits, and the Court therefore cannot decide on these motions whether resolution of the merits will turn on application of the Vienna Convention, either as a matter of federal law trumping the state provisions cited herein or as a matter of New York law under the clause, "unless otherwise exempt from taxation by law," N.Y. Real Prop. Tax Law § 418(1).

suit against a foreign state.[3] *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 439, 109 S.Ct. 683, 102 L.Ed.2d 818 (1989). Under the FSIA, a foreign state is presumed to be immune from suit. *See Saudi Arabia v. Nelson*, 507 U.S. 349, 355, 113 S.Ct. 1471, 123 L.Ed.2d 47 (1993). The party seeking to sue a sovereign bears the burden of overcoming this presumption by showing that a specific immunity exception applies. *See Virtual Countries, Inc. v. Republic of South Africa*, 300 F.3d 230, 241 (2d Cir.2002). The City asserts that the FSIA exception to immunity from suit in any case "in which rights . . . in immovable property situated in the United States are in issue," 28 U.S.C. § 1605(a)(4), removes immunity here.[4]

A. Defendants Are Not Entitled To Immunity Under the FSIA

The Court must begin its task of statutory interpretation with Congress's chosen language. *See Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 450, 122 S.Ct. 941, 151 L.Ed.2d 908 (2002) ("As in all statutory construction cases,

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[3] Although the FSIA states, *"[s]ubject to existing international agreements to which the United States is a party at the time of enactment of this Act* a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States" unless an exception applies, 28 U.S.C. § 1604 (emphasis added), the parties agree that the issue of jurisdictional immunity is controlled by the FSIA and not any preexisting international agreement.

[4] The City also asserts that the FSIA exception to immunity for any case "in which the action is based upon a commercial activity carried on in the United States by the foreign state," 28 U.S.C. § 1605(a)(2), applies. Because the Court concludes that it has jurisdiction under the FSIA's "immovable-property" exception, it need not decide whether the "commercial-activities" exception applies.

we begin with the language of the statute."). As just mentioned, the FSIA provides that a foreign nation will be required to litigate suits implicating "rights in immovable property." But, as then-Judge Scalia has explained, the FSIA's use of this phrase is not very enlightening: "[T]he term 'rights in immovable property' is an imprecise one, susceptible of as many different meanings as there are areas of law for which that characterization of an interest may be relevant." *Asociacion de Reclamantes v. United Mexican States*, 735 F.2d 1517, 1521 (D.C.Cir.1984). Faced with this ambiguity, to determine what Congress intended to include within the immovable-property exception the Court must look to extraneous sources-international practice at the time the FSIA was enacted and the exception's legislative history. *See id.* (examining legislative history and the FSIA's purposes to determine what Congress meant by the language used in the immovable-property exception).

1. *International Practice When The FSIA Was Enacted*

Prior to 1952, federal courts in the United States, following the position of the State Department, generally granted foreign sovereigns complete immunity from suit. *Verlinden B.V. v. Cent. Bank of Nig.*, 461 U.S. 480, 486, 103 S.Ct. 1962, 76 L.Ed.2d 81 (1983). In 1952, the State Department's policy changed, as reflected in a letter that Acting Legal Advisor Jack B. Tate sent to the U.S. Attorney General ("Tate Letter"). *See Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 711-15, 96 S.Ct. 1854, 48 L.Ed.2d 301 (1976) (plurality opinion) (reprinting the Tate Letter). The Tate Letter signified a shift from the absolute to a more restrictive theory of foreign sovereign

immunity. *Verlinden B.V.*, 461 U.S. at 487, 103 S.Ct. 1962. "Under the restrictive, as opposed to the 'absolute,' theory . . . , a state is immune from the jurisdiction of foreign courts as to its sovereign or public acts (*jure imperii*), but not as to those that are private or commercial in character (*jure gestionis*)." *Nelson*, 507 U.S. at 359-60, 113 S.Ct. 1471. Despite these competing views, the Tate Letter explained that, "[t]here is agreement by proponents of both theories, supported by practice, that sovereign immunity should not be claimed or granted in actions with respect to real property (diplomatic and perhaps consular property excepted)." Tate Letter, *reprinted in Alfred Dunhill*, 425 U.S. at 711, 96 S.Ct. 1854.

The restrictive theory of foreign sovereign immunity, set forth in the Tate Letter, was ultimately codified by the FSIA. *See* H.R. No. 94-1487, at 7 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6605 ("[T]he bill would codify the so-called 'restrictive' principle of sovereign immunity, as presently recognized in international law."); *see also Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 612-13, 112 S.Ct. 2160, 119 L.Ed.2d 394 (1992) (holding that the FSIA largely codifies the restrictive theory and that its terms must be read against the backdrop of international practice at the time the FSIA was enacted). The FSIA also adopted the Tate Letter's view that a sovereign may be sued with respect to real property. *Asociacion de Reclamantes*, 735 F.2d at 1521 (explaining that "[t]he immovable property exception was enacted to codify, with minor modifications . . . , the pre-existing real property exception to sovereign immunity recognized by international practice"). Accordingly, the House of Representatives Report on the FSIA notes that the immovable-property exception "denies immunity in litigation relating to rights in real

estate . . . located in the United States. It is established that, as set forth in the 'Tate Letter' of 1952, sovereign immunity should not be granted in actions with respect to real property, diplomatic and consular property excepted." H.R.Rep. No. 94-1487, at 20, 1976 U.S.C.C.A.N. at 6618-19.

The immovable-property exception was thus included in the FSIA in an effort to codify what the Tate Letter generally referred to as settled international practice under the restrictive, and even the absolute, theories of foreign sovereign immunity. But the FSIA itself sheds little light on what in 1976 was the settled international practice as to whether or when a sovereign could be sued in a real-property dispute. In addition, the FSIA does not discuss what the Tate Letter meant when it referred to "diplomatic and . . . consular property" as being excepted from immunity. *See* Tate Letter, *reprinted in Alfred Dunhill*, 425 U.S. at 711, 96 S.Ct. 1854. The answers to these matters serve as guideposts to whether Defendants may be subject to suit here.

International practice at the time of the FSIA's enactment "declined to extend the immunity of a foreign sovereign to 'an action to obtain possession of or establish a property interest in immovable property located in the territory of the state exercising jurisdiction.'" *Asociacion de Reclamantes*, 735 F.2d at 1521 (quoting Restatement (Second) of Foreign Relations Law of the United States § 68(b) (1965)). According to the Second Restatement, "[t]he immunity from jurisdiction of a foreign state [did] not extend to actions for the determination of possession of, or an interest in, immovable or real property located in the territory of a state exercising jurisdiction." Restatement

(Second) of Foreign Relations Law of the United States § 68 cmt. d.[5]

International practice at the time of the FSIA's enactment also reflected acceptance of the principle that "courts are simply not well equipped to decide property interests or rights to possession with regard to land outside their jurisdiction, particularly land located in a foreign nation." *Asociacion de Reclamantes*, 735 F.2d at 1521. This maxim effectively extended to international practice what is understood in domestic property jurisprudence to be the "local-action rule." *See id.* at 1522.[6] That this maxim has been incorporated into international practice is evident in a report of the International Law Commission ("ILC"). In 1977, the United Nations General Assembly gave to the ILC the task of examining and reporting on the international practice of sovereign jurisdictional immunity. *See* Stephen C. McCaffrey, *The Thirty-Fourth Session of the International Law Commission*, 77 Am. J. Int'l L. 323, 328 (1983). During the course of its work, and just a few years after Congress passed the

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[5] The commentary to the Second Restatement also provides that the immovable property exception "does not preclude immunity with respect to a claim arising out of a foreign state's ownership or possession of immovable property but not contesting such ownership or the right to possession." Restatement (Second) of Foreign Relations Law of the United States § 68 cmt. d. But, as the court in *Asociacion de Reclamantes* explained, this provision merely clarifies that "a foreign sovereign was not immune in an eminent domain proceeding involving its property, but was immune in a negligence suit for injury suffered by a private individual while on its property." 735 F.2d at 1521.

[6] As the court in *Asociacion de Reclamantes* stated, the local-action rule "makes the locality's power exclusive and deprives other courts of jurisdiction to settle questions involving real estate." 735 F.2d at 1521-22.

FSIA, the ILC referenced the local-action rule as a reason to remove jurisdictional immunity when real property was at issue. The ILC report thus explained:

> As far as property is concerned, especially immovable property, the State of the *situs* exercises supreme authority as part and parcel of its sovereignty. Indeed, the concept of ownership and other proprietary rights or interests can only exist within the framework of the legal system of the *situs*, and such a concept is bound to be inherently absorbed within the notion of territorial sovereignty of the State of the *situs* itself. . . .
>
> The applicable law is unmistakably the *lex situs* as no other law can be more proper than the law of the place where the property is situated. *A fortiori* the régime or legal relationship with regard to land or immovable property, with its peculiar history, niceties and complexities, has developed in response to the needs of the territorial society, its traditions, usages and customs. Every system of land law or law concerning immovable property is unique in itself. Its exclusive applicability cannot be disputed, since ownership and other proprietary rights or interests in property do not and cannot exist except within the framework and purview of the *lex situs*. The supremacy of the *lex situs* and its sole authority in regard to property have rendered the assumption and exercise of territorial jurisdiction by the *forum rei sitae* all the more inevitable; in the absence of any alternative or competitive system of law, neither the *lex patriae* nor the *lex fori* of an extraterritorial authority could qualify to replace or supplant either the jurisdiction of the *forum rei sitae* or the exclusive applicability of the *lex situs*.

International Law Commission, *Documents of the Thirty-Fifth Session*, [1983] II Y.B. Int'l L. Comm'n 46-47, U.N. Doc. A/CN.4/SER.A/1983/Add.1(Part 1).

When the FSIA was enacted, international law recognized that real property was a matter of unique local import, such that local courts were best equipped to decide all issues pertaining to it. Against this backdrop, a sovereign necessarily acknowledges the supremacy and jurisdiction of local courts when it purchases property, which it will own, use, and possess within the framework of that local law. These general principles have equal force to the dispositive issue here: whether a federal district court may adjudicate the validity of a municipality's tax liens levied against a foreign sovereign's real property. A tax lien is a mechanism created by local law to ensure that landowners pay real-estate taxes. The meaning of such a lien is understood only by resort to the local law from which it originates. Principles of international law thus contemplate that courts sitting in the locality that created the tax lien possess the sole authority to adjudicate issues related to the lien. Hence, international practice at the time of the FSIA's enactment would not provide immunity from the claims asserted here.

Contrary to Defendants' assertion, referring to local law to define the contours of the FSIA's immovable-property exception is not incompatible with Congress's intention of achieving uniformity in the area of foreign sovereign immunity. It is true that the FSIA was intended to create a uniform regime of foreign sovereign immunity. *See* H.R. Rep. 94-1487, at 13, 1976 U.S.C.C.A.N. at 6611 ("[J]urisdiction in the Federal courts should be conducive to uniformity in decision, which is desirable since a disparate treatment of cases involving foreign governments may

have adverse foreign relations consequences."). But the FSIA codifies the exception for real-property suits as it existed under international practice, and that practice responds to the historical reality that "[e]very system of land law or law concerning immovable property is unique in itself." International Law Commission, *Documents of the Thirty-Fifth Session, supra*, at 47. Foreign governments own, use, and possess land subject to the unique regulations of the forum jurisdiction; their property rights derive from, and are protected by, that regime. Because Defendants purchased the land subject to New York's property law, including real-estate taxes and liens to enforce them, they are subject to the resolution of suits arising under that law in New York courts. The FSIA's goal of uniformity is not undermined by, but rather recognizes, that the substance of the applicable property law will necessarily depend on the jurisdiction in which the property is located. That is the very rationale for the local-action rule and the corresponding international practice that the FSIA adopts.

2. *The FSIA's Legislative History*

The legislative history behind the immovable-property exception also suggests that Congress believed matters such as tax liens would lay within that exception. As the court in *Asociacion de Reclamantes* explained, the examples in the House Report that fall within the exception – "questions of ownership, rent, servitudes, and similar matters," H.R. Rep. 94-1487, at 20, 1976 U.S.S.C.A.N. at 6619 – are consistent with the international practice that limited the exception to "disputes directly implicating property interests or rights to possession," *Asociacion de Reclamantes*, 735 F.2d at 1522. Congress intended that

matters similar to ownership, rent, and sérvitudes were to be justiciable; a lien is just such a "similar" matter. The common legal meaning of "servitude" at the time Congress enacted the FSIA was "[a] charge or burden resting upon one estate for the benefit or advantage of another." Black's Law Dictionary 1535 (4th ed.1968). A servitude is therefore a type of encumbrance on property. *See id.* at 908 (defining "incumberance" as "[a]ny right to, or interest in, land which may subsist in another to the diminution of its value, but consistent with the passing of the fee"). At the time the FSIA was enacted, a lien was generally understood to be a "charge or security or incumbrance upon property." *Id.* at 1072. It also has a similar meaning in New York. *See* N.Y. Real Prop. Tax Law § 102(21) ("'Tax lien' means an unpaid tax, special ad valorem levy, special assessment or other charge imposed upon real property by or on behalf of a municipal corporation or special district which is an encumbrance on real property, whether or not evidenced by a written instrument."). Like a servitude, a lien on real property "runs" with the land. *See* Restatement of Prop. § 540 (1944) ("[A] lien is enforceable against the successors in title or possession of the promisor to the extent it was enforceable against him. . . ."). Both servitudes and liens, therefore, burden the land; in so doing, they directly affect the property owner's rights to alienate or convey the property. *See Republic of Argentina v. City of New York*, 25 N.Y.2d 252, 303 N.Y.S.2d 644, 250 N.E.2d 698, 702 (1969).

In *Republic of Argentina v. City of New York*, the New York Court of Appeals held, as a matter of customary international law, that a foreign state's consular property was immune from real-property taxes. *Id.* at 704. The City had argued that it could obtain a tax lien against the

property without offending the foreign sovereign's ownership. *See id.* at 702. The court responded that a lien would also offend the principles of sovereign immunity because "a lien has an immediate adverse effect upon the amount which the [foreign] government would receive on a sale, to sanction its imposition would constitute *a direct interference with the property of a foreign state*. . . ." *Id.* (emphasis added). The court's holding on the merits – that the City was barred from taxing consular property – is not relevant to the instant motion. But the Court of Appeals' observation that, as a matter of New York law, a lien is a direct interference with property rights, strongly favors the City's argument that a suit to adjudicate the validity of a lien puts rights in immovable property in issue. And in a more recent case, the Court of Appeals reiterated its view that tax liens "substantially affect the rights of property owners." *Zaccaro ex rel. Estate of Zaccaro v. Cahill*, 100 N.Y.2d 884, 768 N.Y.S.2d 730, 800 N.E.2d 1096, 1100 (2003).

The rationale behind these holdings is apparent. Part of an owner's rights in real property is the right to alienate or sell the property. The presence of a tax lien means that the owner does not have the power to convey full rights and title to another purchaser, but that any subsequent purchaser would take the property subject to the lien. Thus, a tax lien directly affects a property owner's rights in the property. And a suit adjudicating the validity of such a lien therefore puts in issue the owner's rights in that property. The claimed tax liens directly implicate Defendants' rights in their real property.

3. *Defendants' Specific Arguments Lack Merit*

Defendants maintain that the immovable-property exception does not apply because the tax liens would not deprive them of ownership or possession of the Mission premises. To support this proposition, they rely on *Rodriguez v. Republic of Costa Rica*, 297 F.3d 1 (1st Cir.2002); *City of Englewood v. Socialist People's Libyan Arab Jamahiriya*, 773 F.2d 31 (3d Cir.1985); and *Fickling v. Commonwealth of Australia*, 775 F.Supp. 66 (E.D.N.Y.1991). These cases do not persuade the Court that the exception is as limited as Defendants would have it.

In *Rodriguez*, the plaintiffs sued the Republic of Costa Rica for unpaid rent; the Consul and Vice-Counsel who had been living on the premises had vacated by the time the case reached court and did not seek reinstatement. *See* 297 F.3d at 4-5, 11. The First Circuit held that "purely compensatory rights, without more, are insufficient to sustain jurisdiction under the immovable property exception." *Id.* at 11. That is so, the court held, because the rationale behind the exception is that foreign courts are not equipped to decide property disputes making it "important for property disputes to be adjudicated by local courts." *Id.* at 12 (citing *Asociacion de Reclamantes*, 735 F.2d at 1521). The plaintiffs argued that the House Report referred to actions for rent as among those that came within the exception under international law. The First Circuit rejected this argument, noting that the inclusion of actions for rent most likely referred to such actions that also involve issues of title and possession. *Id.* at 12-13.

The court also rejected the plaintiffs' contention that the Third Restatement of Foreign Relations Law supported their position. *See id.* at 13. The Third Restatement

provides that under the immovable-property exception, as a matter of international practice, "controversies concerning payment of rent, taxes and other fees concerning [premises used for an embassy, consulate, or diplomatic mission] are subject to adjudication in local courts." Restatement (Third) of Foreign Relations Law § 455 cmt. b (1987). The First Circuit reiterated its conclusion that only suits implicating both rent and ownership or possession fall within the exception. *Rodriguez*, 297 F.3d at 13. The court determined that the Restatement referred to "rent, taxes and other fees" sought "in the process of adjudicating 'rights of ownership, possession, occupation or use.'" *Id.* (quoting Restatement (Third) of Foreign Relations Law § 455 cmt. b).

Defendants rely on *Rodriguez* to argue that only those suits that would deprive a foreign sovereign of ownership or possession of immovable property fall within the immovable-property exception. The First Circuit's holding, however, was not so broad. The court merely held that "the immovable property exception applies only in cases in which rights of ownership, use, or possession are at issue." *Rodriguez*, 297 F.3d at 13. *Rodriguez* was not among such cases because the plaintiffs were seeking money damages, essentially for breach of contract. Indeed, the court noted that a suit for nonpayment of rent "is, first and foremost, a contract dispute." *Id.* The court in *Rodriguez* therefore held nothing more than that contract disputes do not involve rights in immovable property simply because the alleged breach occurred during the use or possession of real estate. The result of a successful breach-of-contract suit would be the payment of money; a successful result in these actions, in contrast, would give the City a property right in the Mission premises that would "substantially

affect the rights of [Defendants as] property owners." *Zaccaro*, 768 N.Y.S.2d 730, 800 N.E.2d at 1100. Accordingly, *Rodriguez* does not command the result that Defendants desire.

Nor does *City of Englewood*. The court there held that the immovable-property exception did not apply to a suit by a municipality challenging a local tax board's decision to deny a tax increase on property owned by Libya, which argued that it could not be taxed at all. *See* 773 F.2d at 33. The Third Circuit only briefly discussed the immovable-property exception, simply noting the proposition that the exception "'is limited to disputes directly implicating property interests or rights to possession.'" *Id.* at 36 (quoting *Asociacion de Reclamantes*, 735 F.2d at 1522). The Third Circuit then concluded: "No one disputes Libya's title to the Englewood premises or its right to exclude others from possession thereof. Thus section 1605(a)(4) does not apply." *Id.* The court, however, did not explain why the suit to force the payment of real-property taxes did not directly implicate Libya's property interests even though the payment of such taxes was a condition of owning real estate in Englewood and arose only because of such ownership. In light of the treatment of the immovable-property exception in *City of Englewood*, that case does not offer Defendants adequate support to overcome the authority bolstering the City's position.

And *Fickling* is inapposite here. In *Fickling*, an Australia court issued a "caveat" during divorce proceedings, which precluded the plaintiffs from selling, transferring, and encumbering certain property. *See* 775 F.Supp. at 68. The plaintiffs sought to stretch the immovable-property exception to reach real estate located in the United States that the plaintiffs had used as collateral to

secure a loan from a foreign bank, and which the caveat prevented from being sold or encumbered pending the outcome of the divorce proceedings. *See id.* at 72. The plaintiff sued Australia, alleging jurisdiction to be founded on, among other things, Australia's expropriation of the plaintiffs' property rights.

The court held that the exception did not apply because Australia had not claimed to own or control the property. *Id.* The caveat was not a right in the U.S. property, but merely a procedural device to preserve the integrity of the Australian divorce court's jurisdiction over the marital dispute. The caveat was a product of Australian law, not New York property law as in the case of a lien. Unlike in cases concerning tax liens, the courts of New York have no special competence to adjudicate the propriety of a device originating in Australian law. The *Fickling* suit was an attempt to undo an Australian court order and was best addressed to the Australian court that issued it. Therefore, the rationale for the internationally recognized real-property exception that the FSIA codifies had no application in *Fickling*.

Finally, Defendants contend that the City's position would mean that any dispute could put rights in immovable property in issue, if, by action of state or local law, a litigant could place a lien on real estate. For example, the argument goes, if local law permitted a real-property lien to enforce a tort judgment, then the limitations in the FSIA on jurisdiction over tort suits could be eviscerated. *See* 28 U.S.C. § 1605(a)(5) (providing limited exception to sovereign immunity from tort suits). Or, in the example that the defendants cite, a plaintiff could use the immovable-property exception to "bootstrap" a claim that would not meet the commercial-activities exception's requirements

merely by seeking a lien on real property. While those specters may be raised legitimately elsewhere, they inspire no fear here. The claimed liens arise directly out of Defendants' ownership and use of real estate in the United States. The taxes that the City alleges it is owed are imposed due to ownership and use of the property, not indirectly as a result of some unrelated act such as a tort or breach of contract. Thus, the validity of the property liens "directly implicate[s] interests in the property" because the liens require adjudication of whether Defendants may own and possess the property free of local real-estate taxes. *See Asociacion de Reclamantes*, 735 F.2d at 1522.

B. The Tate Letter's Exception For Diplomatic Property Is Inapplicable

The exception for diplomatic and consular property to which the Tate Letter refers also does not require immunity in these cases. The House Report addressed the exception in the Tate Letter and noted:

> It is maintainable that the exception mentioned in the 'Tate Letter' with respect to diplomatic and consular property is limited to questions of attachment and execution and does not apply to an adjudication of rights in that property. Thus, the Vienna Convention on Diplomatic Relations . . . 23 UST 3227, TIAS 7502 (1972), provides in article 22 that the 'premises of the mission, their furnishings and other property thereon and the means of transport of the mission shall be immune from search, requisition, attachment, or execution.' Actions short of attachment or execution seem to be permitted under the Convention, and a foreign state cannot deny the local state

> the right to adjudicate questions of ownership, rent, servitudes, and similar matters, as long as the foreign state's possession of the premises is not disturbed.

H.R.Rep. No. 94-1487, at 20, 1976 U.S.C.C.A.N. at 6619. According to the House Report, although suits that would disturb a foreign sovereign's ownership and possession of diplomatic premises might be barred, suits such as these that merely concern encumbrances like servitudes would not. Defendants, then, have it exactly backwards: where diplomatic property is concerned, the exception is not limited to suits that would deprive the foreign sovereign of ownership or possession.

If Defendants were correct that Congress only intended suits disturbing a sovereign's ownership or possession of immovable property to fall within the exception, then the observation in the House Report would make no sense. The legislative history suggests that Congress, consistent with its view of international law, intended to permit suits in which rights in diplomatic property were in issue as long as the suits did *not* seek to oust a foreign sovereign from ownership or possession of the property.

III. CONCLUSION

The international practice that the immovable-property exception codifies and the legislative history of the FSIA demonstrate that Defendants are not entitled to immunity from these claims because the tax liens place their and the City's rights in the Mission properties in issue. Accordingly, the Court may exercise jurisdiction under the FSIA to adjudicate the validity of those liens. It is worth emphasizing that this conclusion is not meant to

have any impact on the separate question of whether the properties are immune from taxation. The premises may or may not be exempt from taxation; the Court merely holds today that it is empowered to make that determination. Defendants' motions to dismiss for lack of subject matter jurisdiction are therefore **DENIED**.

So Ordered:

---

28 U.S.C.A. § 1605. General exceptions to the jurisdictional immunity of a foreign state

(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case –

(1) in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver;

(2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States;

(3) in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States;

(4) in which rights in property in the United States acquired by succession or gift or rights in immovable property situated in the United States are in issue;

(5) not otherwise encompassed in paragraph (2) above, in which money damages are sought against a foreign state for personal injury or death, or damage

to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment; except this paragraph shall not apply to –

(A) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused, or

(B) any claim arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights;

(6) in which the action is brought, either to enforce an agreement made by the foreign state with or for the benefit of a private party to submit to arbitration all or any differences which have arisen or which may arise between the parties with respect to a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration under the laws of the United States, or to confirm an award made pursuant to such an agreement to arbitrate, if (A) the arbitration takes place or is intended to take place in the United States, (B) the agreement or award is or may be governed by a treaty or other international agreement in force for the United States calling for the recognition and enforcement of arbitral awards, (C) the underlying claim, save for the agreement to arbitrate, could have been brought in a United States court under this section or section 1607, or (D) paragraph (1) of this subsection is otherwise applicable; or

(7) not otherwise covered by paragraph (2), in which money damages are sought against a foreign state for personal injury or death that was caused by an act of

torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources (as defined in section 2339A of title 18) for such an act if such act or provision of material support is engaged in by an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment, or agency, except that the court shall decline to hear a claim under this paragraph –

(A) if the foreign state was not designated as a state sponsor of terrorism under section 6(j) of the Export Administration Act of 1979 (50 U.S.C. App. 2405(j)) or section 620A of the Foreign Assistance Act of 1961 (22 U.S.C. 2371) at the time the act occurred, unless later so designated as a result of such act or the act is related to Case Number 1:00CV03110(EGS) in the United States District Court for the District of Columbia; and

(B) even if the foreign state is or was so designated, if –

(i) the act occurred in the foreign state against which the claim has been brought and the claimant has not afforded the foreign state a reasonable opportunity to arbitrate the claim in accordance with accepted international rules of arbitration; or

(ii) neither the claimant nor the victim was a national of the United States (as that term is defined in section 101(a)(22) of the Immigration and Nationality Act) when the act upon which the claim is based occurred.

(b) A foreign state shall not be immune from the jurisdiction of the courts of the United States in any case in which a suit in admiralty is brought to enforce a maritime

lien against a vessel or cargo of the foreign state, which maritime lien is based upon a commercial activity of the foreign state: *Provided*, That –

> **(1)** notice of the suit is given by delivery of a copy of the summons and of the complaint to the person, or his agent, having possession of the vessel or cargo against which the maritime lien is asserted; and if the vessel or cargo is arrested pursuant to process obtained on behalf of the party bringing the suit, the service of process of arrest shall be deemed to constitute valid delivery of such notice, but the party bringing the suit shall be liable for any damages sustained by the foreign state as a result of the arrest if the party bringing the suit had actual or constructive knowledge that the vessel or cargo of a foreign state was involved; and
>
> **(2)** notice to the foreign state of the commencement of suit as provided in section 1608 of this title is initiated within ten days either of the delivery of notice as provided in paragraph (1) of this subsection or, in the case of a party who was unaware that the vessel or cargo of a foreign state was involved, of the date such party determined the existence of the foreign state's interest.

(c) Whenever notice is delivered under subsection (b)(1), the suit to enforce a maritime lien shall thereafter proceed and shall be heard and determined according to the principles of law and rules of practice of suits in rem whenever it appears that, had the vessel been privately owned and possessed, a suit in rem might have been maintained. A decree against the foreign state may include costs of the suit and, if the decree is for a money judgment, interest as ordered by the court, except that the court may not award judgment against the foreign state in an

amount greater than the value of the vessel or cargo upon which the maritime lien arose. Such value shall be determined as of the time notice is served under subsection (b)(1). Decrees shall be subject to appeal and revision as provided in other cases of admiralty and maritime jurisdiction. Nothing shall preclude the plaintiff in any proper case from seeking relief in personam in the same action brought to enforce a maritime lien as provided in this section.

(d) A foreign state shall not be immune from the jurisdiction of the courts of the United States in any action brought to foreclose a preferred mortgage, as defined in the Ship Mortgage Act, 1920 (46 U.S.C. 911 and following). Such action shall be brought, heard, and determined in accordance with the provisions of that Act and in accordance with the principles of law and rules of practice of suits in rem, whenever it appears that had the vessel been privately owned and possessed a suit in rem might have been maintained.

(e) For purposes of paragraph (7) of subsection (a) –

(1) the terms "torture" and "extrajudicial killing" have the meaning given those terms in section 3 of the Torture Victim Protection Act of 1991;

(2) the term "hostage taking" has the meaning given that term in Article 1 of the International Convention Against the Taking of Hostages; and

(3) the term "aircraft sabotage" has the meaning given that term in Article 1 of the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation.

(f) No action shall be maintained under subsection (a)(7) unless the action is commenced not later than 10 years

after the date on which the cause of action arose. All principles of equitable tolling, including the period during which the foreign state was immune from suit, shall apply in calculating this limitation period.

(g) Limitation on discovery. –

(1) In general. – (A) Subject to paragraph (2), if an action is filed that would otherwise be barred by section 1604, but for subsection (a)(7), the court, upon request of the Attorney General, shall stay any request, demand, or order for discovery on the United States that the Attorney General certifies would significantly interfere with a criminal investigation or prosecution, or a national security operation, related to the incident that gave rise to the cause of action, until such time as the Attorney General advises the court that such request, demand, or order will no longer so interfere.

(B) A stay under this paragraph shall be in effect during the 12-month period beginning on the date on which the court issues the order to stay discovery. The court shall renew the order to stay discovery for additional 12-month periods upon motion by the United States if the Attorney General certifies that discovery would significantly interfere with a criminal investigation or prosecution, or a national security operation, related to the incident that gave rise to the cause of action.

(2) Sunset. – (A) Subject to subparagraph (B), no stay shall be granted or continued in effect under paragraph (1) after the date that is 10 years after the date on which the incident that gave rise to the cause of action occurred.

(B) After the period referred to in subparagraph (A), the court, upon request of the Attorney General, may

stay any request, demand, or order for discovery on the United States that the court finds a substantial likelihood would –

(i) create a serious threat of death or serious bodily injury to any person;

(ii) adversely affect the ability of the United States to work in cooperation with foreign and international law enforcement agencies in investigating violations of United States law; or

(iii) obstruct the criminal case related to the incident that gave rise to the cause of action or undermine the potential for a conviction in such case.

(3) Evaluation of evidence. – The court's evaluation of any request for a stay under this subsection filed by the Attorney General shall be conducted ex parte and in camera.

(4) Bar on motions to dismiss. – A stay of discovery under this subsection shall constitute a bar to the granting of a motion to dismiss under rules 12(b)(6) and 56 of the Federal Rules of Civil Procedure.

(5) Construction. – Nothing in this subsection shall prevent the United States from seeking protective orders or asserting privileges ordinarily available to the United States.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
THURGOOD MARSHALL UNITED STATES COURTHOUSE
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JOHN M. WALKER, JR.
CHIEF JUDGE

ROSEANN B. MacKECHNIE
CLERK

January 9, 2006

BY MAIL AND FACSIMILE (FAX# 202-736-7541)

Wynne Teal, Esq.
Department of State
Office of the Legal Advisor
Office of Diplomatic Law and Litigation
2201 C Street NW
Washington, DC 20520

Re: *City of New York v. Permanent Mission of India*, 05-4260-cv

Dear Ms. Teal:

On January 23, 2006, a panel of the Second Circuit is scheduled to hear the case *City of New York v. Permanent Mission of India*, 05-4260-cv. This case requires the Court to decide whether New York City may sue foreign embassies over failure to pay property taxes allegedly owed, and in the process to interpret the "immovable property" exception to the Foreign Sovereign Immunity Act's general rule that foreign governments are immune from suit in United States courts. *See* 28 U.S.C. § 1605(a)(4) (providing that foreign governments shall not be immune in any case in which "rights in immovable property situated in the United States are in issue").

Our circuit has never before had occasion to interpret this provision, and the other circuits that have done so have taken very different approaches. *Compare Association de Reclamantes v. The United Mexican States*, 735 F.2d 1517, 1522 (D.C. Cir. 1984) (concluding that exception extends to "disputes directly implicating property interests Or rights to possession") *with City of Englewood v. Socialist People's Libyan Arab Jamahiriya*, 773 F.2d 31, 37 (3d Cir. 1985) (concluding that exception only applies where what is at issue is foreign government's "title to the . . . premises or its right to exclude others from possession thereof") *with Fagot Rodriguez v. Republic of Costa Rica*, 297 F.3d 1, 13 (1st Cir. 2002) (holding that dispute must "implicate rights of ownership, use, or possession" for exception to apply).

Given the ambiguity of the statutory language, the diverging interpretations this provision has received, and the possible implications for diplomatic relations that the Court's decision may have, the Court solicits any views the Department of State might have on the subject. While the Court would welcome any response, it is particularly interested in your views on:

> (1) Whether the "immovable property" exception should be interpreted to accord with the more detailed version of this provision found in Article 13 of the recently adopted United Nations Convention on Jurisdictional Immunities of States and Their Property, as well as that found in Article 9 of the European Convention on State Immunity, both of which disallow claims of immunity where proceedings relate to either: (a) a state's rights or interests in, or use of possession of, real property, or (b) a state's "obligations" arising out of the same?

(2) Whether any considerations of diplomatic and foreign relations counsel a relatively narrow or expansive reading of this exception?

We would appreciate a response of no more than ten single-spaced pages by **January 20, 2006, at noon.**

If you have any questions, please do not hesitate to call me. My direct line is 212-857-8585.

Very truly yours,

/s/ Roseann B. MacKechnie
Roseann B. MacKechnie
Clerk of Court

[SEAL]

U.S. Department of Justice

United States Attorney
Southern District of New York

86 Chambers Street, 3rd Floor
New York, New York 10007

February 23, 2006

BY HAND DELIVERY

The Honorable Roseann B. MacKechnie
Clerk, Court of Appeals for the Second Circuit
Thurgood Marshall U.S. Courthouse, 40 Foley Square
New York, N.Y. 10007

Re: *New York City v. Permanent Mission of India, et al.*, 05-4260-cv *New York City v. Bayaryn Jargalsaikhan (Mongolia)*, 05-4263-cv

Dear Ms. MacKechnie:

We write on behalf of the United States Government in response to your letter of January 9, 2006, in which the Court invited the U.S. Department of State to provide its views on the following two questions:

> (1) Whether the "immovable property" exception should be interpreted to accord with the more detailed version of this provision found in Article 13 of the recently adopted United Nations Convention on Jurisdictional Immunities of States and Their Property, as well as that found in Article 9 of the European Convention on State Immunity, both of which disallow claims of immunity where proceedings relate to either: (a) a state's rights or interests in, or use of possession of, real property, or (b) a state's "obligations" arising out of same?

(2) Whether any considerations of diplomatic and foreign relations counsel a relatively narrow or expansive reading of this exception?

We enclose three additional copies of this letter, for distribution to the members of the panel (Katzmann, Hall, C.JJ., Korman, D.J.).

Summary of Responses

(1) No, the immovable property exception of the Foreign Sovereign Immunity Act ("FSIA"), 28 U.S.C. § 1605(a)(4), should not be interpreted to accord with the broader immovable property provisions of the United Nations Convention on Jurisdictional Immunities of States and Their Property ("UN Convention") or the European Convention on State Immunity ("European Convention;" together, "Conventions"), because (a) the Conventions do not address and therefore do not purport to abrogate immunity from tax liability disputes, and (b) the FSIA's immovable property exception is drafted more narrowly than the exceptions in the Conventions. Further, the FSIA precludes the Court's jurisdiction here.

(2) Considerations of diplomatic and foreign relations counsel in favor of a narrow reading of the immovable property exception to sovereign immunity.

I. Question One

A. The European and U.N. Conventions Do Not Abrogate Immunity from Tax Liability Suits

The Conventions do not address and therefore do not purport to abrogate sovereign immunity from suits over tax liabilities, and it is not apparent that the Conventions bear on the questions before the Court.

The European Convention: The United States is not a party to this Convention, which entered into force in 1976 and currently has eight parties. Article 9 of the European Convention abrogates immunity from suits between its parties as to a country's "rights or interests in, or its use or possession of, immovable property; or its obligations arising out of its rights or interests in, or use or possession of, immovable property." Article 29, however, provides that the European Convention "shall not apply to proceedings concerning . . . customs duties, taxes or penalties." The Convention's Explanatory Report articulates the intent of Article 29: "Article 9 covers . . . proceedings relating to payments due from a State for the use of immovable property . . . with the exception of dues or taxes." *Explanatory Report of the European Convention on State Immunity* (ETS No. 074) ¶ 44, http://conventions.coe.int/Treaty/en/reports/Html/074.htm. According to the Explanatory Report, taxes are excluded because "the Convention is essentially concerned with 'private law' disputes between individuals and States." *Id.* ¶ 113.

The UN Convention: This convention has not yet entered into force, has not been signed by the United States, and postdates the FSIA by 28 years. Further, although Article 13 appears on its face to contain a broad exception to immunity for "any right or interest of the State in, or its possession or use of, or any obligation of the State arising out of its interest in, or its possession or use of, immovable property," the UN Convention's negotiating history reveals that Article 13 (like Article 9 of the European Convention) was not intended to apply to tax disputes.

The early discussions within the International Law Commission[1] indicated that the drafters considered whether to include a provision that would have eliminated immunity from tax cases. In 1984, they drafted a "fiscal" article that waived sovereign immunity from suits to collect taxes on real property used for commercial purposes. Special Rapporteur's Sixth Report on Jurisdictional Immunities of States and Their Property, A/CH.4/376, 31 January 1984 at 50 (Article 17). This article was amended in mid-1984, and, although the language is broad on its face, the negotiating history indicates that it mirrors the exception of the earlier drafts, *i.e.*, removing the exception to immunity for suits on property used for commercial purposes. Report of the International Law Commission on the Work of its Thirty-Sixth session, 7 May – 27 July 1984 (A/39/10) at 163. Then, after years of review, this "fiscal" article (Article 15) was deleted in 1991, because, according to the Drafting Committee Chairman:

> the article concerned only relations between two States, the forum State and the foreign State; it therefore dealt with abilateral international problem governed by existing rules of international law. . . . The second reason [for deletion] was that the draft as a whole dealt with relations between a State and foreign natural or juridical persons, the purpose being either to protect the State against certain actions brought against it by such persons or, conversely, to enable those persons to protect themselves against the State. Hence, article 15, dealing as it did solely with inter-State relations, did not fall within the real

[1] Established in 1948, the International Law Commission ("ILC") has a mandate to develop and codify international law, in accordance with the Charter of the United Nations.

> scope of the draft articles; it merely gave rise to problems of interpretation *vis-á-vis* the diplomatic and consular conventions.

Yearbook of the International Law Commission 1991, Vol. 1 (Summary Records of meetings of 43rd Session, 29 April – 19 July 1991) at 84, ¶ 6.

The remaining Article 13 exception to immunity for immovable property of the draft UN Convention thus was not meant to apply to tax disputes, which had been deemed an aspect of "inter-State relations" outside the scope of the Convention. The district court in this case erred, therefore, in relying on the 1983 International Law Commission Report without reference to the ILC's 1991 decision to exclude inter-State disputes from the UN Convention. *See City of New York v. Permanent Mission of India*, 376 F. Supp. 2d 429, 434 (S.D.N.Y. 2005).

In sum, neither of the Conventions was meant to address tax disputes or abrogate sovereign immunity where such suits relate to real property in non-commercial use. This conclusion is bolstered by other evidence of international practice, such as the United Kingdom State Immunity Act of 1978 – a model followed by other commonwealth countrie s– which includes a broad immovable property exception similar to Article 9 of the European Convention and a separate, express carve-out from immunity for tax claims related to commercial use.

B. Even if the Conventions Governed Tax Disputes, the FSIA Exception Is Narrower

Even if the Conventions did apply to tax disputes, the United States is not a signatory to the Conventions, and the FSIA's immovable property exception is drafted more

narrowly, such that its scope must be understood differently. The FSIA exception applies only to cases "in which rights in immovable property situated in the United States are in issue." 28 U.S.C. § 1605(a)(4). The European and UN Conventions, by contrast, respectively address "obligations arising out of [a Contracting State's] rights or interests in, or use or possession of, immovable property" or "any obligation of the state arising out of its interest in, or its possession or use of immovable property." By limiting the FSIA exception to "rights in immovable property," Congress ensured that it is a "relatively minor exception[] to immunity." *Asociacion de Reclamantes v. United Mexican States*, 735 F.2d 1517, 1520 (D.C. Cir. 1984); *compare with* 28 U.S.C. § 1605(a)(2) (FSIA's broader commercial properties exception, abrogating immunity from actions "based upon a commercial activity"). This narrow exception is consistent with pre-FSIA doctrine, with which Congress intended to ensure consistency. *See, e.g., Restatement (2d) of Foreign Relations*, § 68, cmt. d ("The rule [exempting actions to "obtain possession of or establish a property interest in immovable property"] does not preclude immunity with respect to a claim arising out of a foreign state's ownership or possession of immovable property but not contesting such ownership or the right to possession").

Accordingly, even if the Court were to read the Conventions to abrogate immunity for claims based on property tax liens on non-commercial property, the Court should not interpret the FSIA's narrow immovable property exception as expansively as the exceptions in the Conventions.[2]

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[2] The Department of Justice filed an *amicus* brief in 1985 supporting rehearing *en banc* of the Third Circuit's decision in *City of Englewood v. Socialist People's Libyan Arab Jamahiriya*, 773 F.2d 31, 34-36

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C. The FSIA Precludes Grounding Jurisdiction on Unadjudicated Tax Liens

The Supreme Court has directed that foreign states are immune from jurisdiction unless an activity falls within one of the exceptions to immunity under the FSIA. *See Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 489 (1983). Because of the important purposes served by the doctrine of foreign sovereign immunity, including its reciprocal consequences for the United States government abroad, the FSIA's waivers of sovereign immunity must be narrowly construed.[3]

(3d Cir. 1985). In that brief, the Government argued that the immovable property exceptions of Section 1605(a)(4) and the Conventions were consistent. Upon further review, the Government has concluded that the brief erred with respect to the European Convention; as to the UN Convention, the Government did not have the benefit of subsequent developments, and the 1991 elimination of the "fiscal" article clarified that the UN Convention did not apply to tax disputes between states.

[3] Congress recently passed the Foreign Operations, Export Financing and Related Programs Appropriations Act ("FOAA") of 2006, which includes a provision requiring the Department of State to withhold an amount equal to 110 percent of "unpaid taxes and interest determined to be owed by a foreign country on real property in the District of Columbia or New York, New York in a court order or judgment against such country by a court. . . ." Pub. L. No. 108-447, § 543(a), (f), 118 Stat. 2809, 3011. This provision is not relevant here, as there is no evidence that Congress intended to revise the FSIA's jurisdictional limits when it created this potential penalty. Further, funds withheld from obligation under Section 543 of the FOAA are reprogrammed to provide assistance for programs and activities in other countries. *Id.* §543(b).

1. The Tax Lien Is a Back Door Means to Gain Jurisdiction Over a Tax Dispute

The district court's decision would permit New York to eliminate sovereign immunity over a claim that is, fundamentally, a tax dispute between India and Mongolia and New York. Although styled as a property dispute over a lien on real property, the true claim here is for unpaid back taxes on properties used to house diplomatic mission personnel. As New York concedes in its brief, this suit will require determination of "whether taxation was lawfully imposed on the premises." (Appellee's Br. 37).

New York could not have directly sued India and Mongolia for back taxes on diplomatic property, since the FSIA does not waive sovereign immunity for such claims. *See Rodriguez v. Republic of Costa Rica*, 297 F.3d 1, 11 (1st Cir. 2002) (no jurisdiction over suit for non-payment of rent or trespass, since "purely compensatory rights, without more, are insufficient to sustain jurisdiction under the immovable property exception"); *Reclamantes*, 735 F.2d at 1525 (no jurisdiction over compensation claims based on uncompensated taking of previously held land grant claims).[4] Further, because the properties on which

[4] The *Restatement (Third) of Foreign Relations Law* provides that the immovable property exception extends to "rights of ownership, possession, occupation, or use, as well as controversies concerning payment of rent, taxes, and other fees concerning" premises used or owned by the foreign sovereign. *See Restatement (Third)*, § 455, comment b (1987). This Court has directed courts to be "vigilant" when relying on the "controversial" *Restatement (Third)*. *U.S. v. Yousef*, 327 F.3d 56, 100 (2d Cir. 2003). Such vigilance is warranted here because, in 1976, when Congress passed the FSIA, the then-current version of the Restatement contained no mention of an exception to immunity for tax suits. *See Restatement (Second) of Foreign Relations Law*, § 68(b), comment d (1965) (exception applies to claims seeking to "establish a

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the taxes were levied are used by India and Mongolia for diplomatic purposes – to house diplomats and lower level personnel at their missions to the UN – the "commercial activities" exception does not apply. 28 U.S.C. § 1605(a)(2). Thus, the only possibly applicable exception to sovereign immunity is the immovable property exception, which waives immunity for disputes about "rights in property," not compensatory damages claims, such as for unpaid taxes.

Yet this suit requires the Court to decide whether India and Mongolia owe taxes, not whether they own or are entitled to possession of their properties. New York's tax lien arises by operation of statute, not as the result of an administrative process or court proceeding. N.Y.C. Admin. Code § 11-301. New York seeks a judgment pursuant to N.Y.C. Admin. Code section 11-338, which provides that "In an action to foreclose a tax lien, *unless the defendants obtain judgment*, the plaintiff shall be entitled to a judgment establishing the validity of the tax lien *so far as the same shall not be adjudged invalid . . .* " (emphasis added). Thus, to prevail on a claim to foreclose on a lien, New York must prove the validity of its tax claim. Here, however, India and Mongolia insist that the tax is invalid, and that no court has jurisdiction over them to adjudge

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property interest in immovable property;" no immunity for "actions for the determination of possession of, or an interest in, immovable or real property"). Thus, the *Restatement (Third)* overstates the scope of the immovable property exception to the extent it suggests that each type of controversy listed would independently support jurisdiction. *See Rodriguez*, 297 F.3d at 13 (immovable property exception does not apply to suit for breach of rent contract; rejecting plaintiff's reliance upon reference to "rent" in *Restatement (Third)* in support of contrary argument).

the tax valid. Thus, the City's complaint seeking a declaration of a valid tax lien requires the district court to decide the very question that it has no jurisdiction to hear – the validity of a claim for taxes against a foreign sovereign.

The district court's jurisdiction and defendants' sovereign immunity should not hinge on whether a tax dispute is styled as a suit for back taxes or a lien dispute. This Court has held that, to determine the scope of the waiver of U.S. sovereign immunity under the Federal Tort Claims Act, "a court must look, not to the theory upon which the plaintiff elects to proceed, but rather to the substance of the claim which he asserts." *Lambertson v. U.S.*, 528 F.2d 441, 443 (2d Cir. 1976). For example, where suits in battery are barred and suits in negligence are permitted, "to permit plaintiff to recover by 'dressing up the substance' of battery in the 'garments' of negligence would be to 'judicially admit at the back door that which has been legislatively turned away at the front door.'" *Id.* at 445 (citation omitted). This case presents the same type of incursion on sovereign immunity.

The district court dismissed the defendants' concern that the City used a tax lien to "bootstrap" an otherwise nonjusticiable claim into the immovable property exception, reasoning that here the tax liens "arise directly out of Defendants' ownership and use of real estate." *Permanent Mission of India*, 376 F. Supp. 2d at 438. This logic – which grounds jurisdiction not on the fact of a lien, but on the nexus of the lien to real property ownership – opens the door to a sweeping waiver of sovereign immunity. There are a multitude of liens that "arise directly out of Defendants' ownership and use of real estate." *Id.* New York City "has created several statutory liens in its favor against real property owned by persons subject to enforcement

action pursuant to various sections of the New York City Administrative Code." Melvyn Mitzner, Liens and Encumbrances, *Real Estate Titles*, 311 (James M. Pedowitz ed., 1984). These statutory City liens include, *inter alia*, the emergency repair lien, the relocation lien, the pest control lien, the housing violations and civil penalty lien, the canopy lien, the leaking tap lien, the building inspection fees lien, the sidewalk repair lien, and the environmental control board lien. *Id.* at 311-314. Many if not all of these liens are as closely associated with real property ownership as a tax lien.

Further, the district court's implication that the liens trigger the immovable property exception because they "arise directly out of" property ownership contradicts years of FSIA jurisprudence limiting the exception to suits directly about property ownership and use, not the effects of or obligations from such ownership. Contrary to the district court's suggestion, rent, zoning, and even tort disputes can easily be understood to "arise directly out of" the ownership and use of real property. For example, the Supreme Court has determined that zoning laws work to impose "additional restrictions in respect of the use and occupation of private lands." *Village of Euclid, Ohio v. Amber Realty*, 272 U.S. 365, 386-87 (1926). And as to tort suits "involving liability for injuries arising from conditions on property, the existence of a duty generally depends upon 'occupancy, ownership, control or a special use of [the] premises' by the defendant." *Sutera v. Go Jokir*, 86 F.3d 298, 302 (2d Cir. 1996) (citation omitted).

The courts, however, have consistently refused to extend jurisdiction to such claims under the immovable property exception. *See Rodriguez*, 297 F.3d at 13 (dispute over unpaid rent does not trigger immovable property

exception because exception limited to "cases in which rights of ownership, use or possession are at issue," not claims "somehow related to real property"); *City of Englewood*, 773 F.2d at 34-36 (no jurisdiction over suit seeking to execute on claimed lien for unpaid property taxes because the immovable property exception is a "title dispute exception" limited to disputes over title or possession of real property); *MacArthur Area Citizens Assoc. v. Republic of Peru*, 809 F.2d 918 (D.C. Cir. 1987), *modified on other grounds*, 823 F.2d 606 (D.C. Cir. 1987) (suit concerning conversion of property allegedly in violation of local zoning laws not within real property exception; exception "not intended broadly to abrogate immunity for any action touching upon real estate"); *Reclamantes*, 735 F.2d at 1524 (no jurisdiction over purely compensatory claim arising out of real property ownership).[5]

Thus, courts interpreting the FSIA immovable property exception have repeatedly rejected the idea that claims that "arise directly out of" property ownership trigger the exception. The district court erred when it grounded the abrogation of sovereign immunity on tax liens that allegedly arise out of the foreign sovereign's property ownership.[6]

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[5] In *Reclamantes*, then-Judge Scalia appeared to approve of a holding that plaintiffs triggered the immovable property exception when they amended their complaint for unpaid taxes by adding a request for declaratory judgment on a statutory tax lien. *See* 735 F.2d at 1522 (*citing County Board v. Govt of the German Dem. Rep.*, Civ. No. 78-293-A (E.D. Va. Sept. 6, 1978), *rev'd on other grounds, U.S. v. Arlington*, 702 F.2d 485 (4th Cir. 1983)). But this citation, which was in dictum and without explanation, provides little guidance here.

[6] In the amicus brief discussed *supra*, note 2, which unsuccessfully sought rehearing in *Englewood*, the Government argued that tax liens

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2. Grounding Jurisdiction on Liens Is Inconsistent with the FSIA's Anti-Attachment Provisions

The FSIA permits pre judgment attachment only on a sovereign's commercial property, after judicial action, where the sovereign has waived its immunity from pre judgment attachment, and where the attachment is "not to obtain jurisdiction." 28 U.S.C. § 1610(d)(2). Indeed, a crucial purpose of the FSIA was to end the practice of obtaining jurisdiction over foreign states by seizing their property. *See* H.R. Rep. 94-1487, 94th Cong., 2d Sess. (1976) at 26-27 ("[I]t should be pointed out that neither section 1610 nor 1611 would permit an attachment for the purpose of obtaining jurisdiction over a foreign state or its property. For this reason, section 1609 has the effect of precluding attachments as a means for commencing a lawsuit. . . . This shotgun approach has caused significant irritation to many foreign governments."); *Englewood*, 773 F.2d at 34 (FSIA directed at eliminating practice of seizing sovereigns' property in order to compel their appearance).[7]

Here, New York's liens are analogous to *de facto* attachments on sovereign property, used to obtain jurisdiction. The district court asserted jurisdiction on the ground that the tax liens were "rights in immovable property"

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implicated immovable property for purposes of the FSIA exception. That brief did not address all of the issues discussed herein, however, and, upon further review, the Government no longer subscribes to that position.

[7] In fact, the only FSIA provision pertaining to liens, the exception from jurisdictional immunity for a suit in admiralty brought to enforce a commercial maritime lien, converts the claim into an *in personam* action against the foreign state, and does not allow an arrest of the vessel. *See* 28 U.S.C. § 1605(b); H.R. Rep. 94-1487 at 21-22.

under the immovable property exception because liens "burden the land [and] in so doing, they directly affect the property owner's rights to alienate or convey the property." *Permanent Mission of India*, 376 F. Supp. 2d at 436. The district court reasoned that "a lien is a direct interference with property rights" and that the "presence of a tax lien means that the owner does not have the power to convey full rights and title to another purchaser, but that any subsequent purchaser would take the property subject to the lien." *Id.* Thus, according to the district court, it is the liens' ability to attach to and encumber defendants' property that triggers the immovable property exception and confers jurisdiction over India and Mongolia.

This ruling ignores the anti-attachment provisions of the FSIA, which bar the attachment of sovereign property as a basis for jurisdiction. Section 1610(d)(2) of the anti-attachment provisions would be seriously undermined if an unadjudicated statutory tax lien placed on non-commercial sovereign property could attach to such property and thereby confer jurisdiction over a dispute as to back taxes. At least one court has equated consent to a lien with a waiver of jurisdictional immunity, holding that a contractual provision agreeing to place a lien on sovereign commercially-used property "cannot be interpreted as granting anything other than consent to a pre judgment arrest and attachment" for FSIA purposes. *Enron Equipment Procurement Co. v. The M/V Titan 2*, 82 F. Supp.2d 602, 610 (W.D. La. 1999).[8]

[8] The anti-attachment provisions of the FSIA refer to "attachment arrest and execution." 28 U.S.C. § 1609. Section 1610(a) articulates the exceptions to the ban, including for "attachment in aid of execution" in prescribed circumstances; its legislative history provides that "the term

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Therefore, because the FSIA prohibits courts from using the attachment of non-commercial sovereign property as the basis for the court's jurisdiction, the City's statutory tax liens cannot trigger the immovable property exception.

3. Pre-FSIA Case Law Counsels Against Jurisdiction Over Tax Lien Suits

Our review of the few informative pre-FSIA cases indicates that pre-FSIA courts did not exercise jurisdiction over foreign sovereigns on the basis of tax liens on sovereign-owned properties, regardless of whether the underlying tax was valid. In *Republic of Argentina v. City of New York*, 25 N.Y. 252, 262, 303 N.Y.S.2d 644, 650 (N.Y. 1969), the Court of Appeals ruled:

> The corporation counsel contends . . . that its claims for unpaid taxes constitute a lien on the property. . . . The city, however, has no power to transform its tax claim into a lien. Just as it may not compel the payment of a

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'attachment in aid of execution' is intended to include attachments, garnishments and supplemental proceedings available under applicable Federal or State law to obtain satisfaction of a judgment." H.R. Rep. 94-1487 at 28. As the *Enron* decision reflects, an unadjudicated lien, imposed for purposes of acquiring jurisdiction, is barred by these anti-attachment provisions. *Enron*, 82 F. Supp. 2d at 610; *see also Black's Law Dictionary*, 933 (7th ed. 1999) (defining lien as a "legal right or interest that a creditor has in another's property, lasting usually until a debt or duty that it secures is satisfied."). And, whereas an "attachment in aid of execution" of a judgment would take place only after a court had adjudicated a matter and rendered a judgment, statutory liens are unadjudicated, and arise before judgment. *See* Mitzner, *Real Estate Titles* at 299-322 (detailing the process by which statutory liens are filed). Thus, statutory liens are *a fortiori* barred as a basis for jurisdiction by the FSIA's anti-attachment provisions, because they encumber property without court process.

> tax by proceeding directly against the plaintiff's property, its imposition of a lien, which would affect the property indirectly by reducing the sum it could realize on sale to a subsequent purchase, would constitute an impermissible exercise of jurisdiction over another state's property.

Although *Argentina* is of limited relevance since jurisdiction was not at issue (the sovereign paid the tax and submitted to jurisdiction by suing for a refund), it may provide guidance: the court ruled that "since a lien has an immediate adverse effect upon the amount which the government would receive on a sale, to sanction its imposition would constitute a direct interference with the property of a foreign state and, as such, would violate the principle of sovereign immunity." *Id.*

Similarly, in *New Rochelle v. Republic of Ghana*, the town sued to foreclose tax liens on parcels owned by foreign sovereigns (based on taxes of undisputed validity). 255 N.Y.S.2d 178, 179 (Ct. Court Westchester 1964). The Department of State asserted that New York courts lacked jurisdiction to foreclose the tax lien; the court held that it had jurisdiction, but that "the overwhelming weight of opinion holds that jurisdiction over proceedings such as these should not be exercised." *Id.* at 179-80.

Thus, the pre-FSIA cases, although grounded on different jurisdictional rules than those of the post-FSIA era, counsel against exercising jurisdiction over suits to enforce tax obligations through tax liens.

4. The FSIA's Legislative History Does Not Suggest Jurisdiction Over Tax Lien Suits

The district court concluded that the legislative history of the FSIA "suggests that Congress believed matters such as tax liens would lay within that exception." *Permanent Mission of India*, 376 F. Supp. 2d at 435 (*citing* H.R. Rep. 94-1487 at 20 (exception applies to "questions of ownership, rent, servitudes, and similar matters")). This interpretation of the legislative history is incorrect.

A tax lien is an interest that "substantially affect[s] the rights of property owners," *Zaccaro v. Cahill*, 100 N.Y.2d 884, 890, 768 N.Y.S.2d 730 (N.Y. 2003), and survives as a secured interest in the property even if the owner changes. But it differs from a servitude in meaningful ways. Disputes involving "ownership, rents, [and] servitudes" address the direct and immediate use and possession of property, and thus implicate the "peculiar, history, niceties, and complexities" of local real property law. *Permanent Mission of India*, 376 F. Supp. 2d at 434. Liens, by contrast, are an encumbrance imposed as security for monetary debt. *See, e.g.*, 11 U.S.C. § 101(37) (lien defined as a "charge against or interest in property to secure payment of a debt or performance of an obligation"); *Restatement of the Law on Property (First)*, § 540, cmt a ("the lien constitutes merely additional security for the performance of the promise"); *Restatement of the Law on Property (Third)*, § 8.3 (a "servitude may be enforced by any appropriate remedy or combination of remedies, which may include . . . imposition of liens.").

The distinction between liens and servitudes is significant to the interpretation of the immovable property exception. A lien holder's primary claim is to payment of a debt, whereas a person suing on a lease, for title, or on a

servitude is seeking an immediate interest in the property itself. Because the debts undergirding a lien may be of any variety, cases involving liens are unlikely to turn on the peculiarities and complexities of local property law, whereas "questions of ownership, rent, servitudes, and similar matters" always do. *Cf. Department of the Army v. Blue Fox, Inc.*, 525 U.S. 255, 262-263 (1999) (liens are merely a means to the end of satisfying a claim to recover money; they provide a substitute, compensatory remedy, not specific relief); *Weinstein v. Taylor*, 234 N.Y.S.2d 926, 929 (N.Y. Sup. Ct. 1962) (tax lien differs from estate or interest in real property). Thus, the rationale underlying the immovable property exception – that local jurisdictions should resolve local real property disputes – applies with much less force to liens than to servitudes, since liens generally cannot provide the "specific relief" of a direct claim to ownership or use of the property.

Accordingly, a single reference to servitudes in the legislative history of the FSIA does not suggest that the immovable property exception waives sovereign immunity from suits over tax liens.

II. Question Two

Considerations of diplomatic and foreign relations counsel in favor of a narrow reading of the immovable property exception to sovereign immunity, and against an assertion of jurisdiction over this dispute over taxes on diplomatic property.

If this Court upholds a finding of jurisdiction, there is concern that the U.N. diplomatic community would respond vigorously, perhaps asserting that the United States is failing to live up to its obligation to protect against

infringements of sovereign immunity, or arguing that international disputes over treaty obligations should not be resolved in the domestic courts of the host state. Asserting jurisdiction over a government-to-government tax dispute, where no commercial activity is involved and the rights asserted to be at issue would allegedly derive from the U.N. Headquarters Agreement, the U.N. General Convention on Privileges and Immunities, and the Vienna Convention on Diplomatic Relations, would be particularly controversial. Some countries might make an effort to refer the matter, through the U.N.'s Host Country Committee and the General Assembly, to the International Court of Justice. In short, a finding of jurisdiction here would permit a decision by New York City's taxing authorities to trigger a confrontation between the United States and the United Nations that could have serious implications for their diplomatic relationship.

Additionally, if New York can proceed with suits against foreign sovereigns for unpaid property taxes based on liens on their properties, there is a danger that those countries would respond in kind. Placing liens upon U.S.-owned real property abroad in order to permit local courts to assert jurisdiction, perhaps even in cases with an attenuated connection to the real property, would interfere with the operations of U.S. missions abroad. A judgment in favor of jurisdiction here would certainly hinder the United States in its efforts to assert sovereign immunity from taxes allegedly owed abroad, particularly if the tax claim is reduced to a lien.

Further, the State Department has advised that bilateral relations with one of the sovereign defendants have already been adversely affected by the suit and the district court's assertion of jurisdiction over this sovereign;

specifically, the sale of a major piece of U.S.-owned property has been blocked. This response is typical of the sorts of measures that can be expected in response to an assertion of jurisdiction, and will hamper the ability of U.S. missions abroad to buy, sell and construct diplomatic properties. *See* PL 109-108, Title IV (authorizing $600 million for the Diplomatic Security Construction Program and $900 million for worldwide security upgrades).

Accordingly, considerations of foreign policy, including concerns about engendering bilateral frictions, impeding U.S. mission operations abroad, and provoking reciprocal attempts at asserting jurisdiction over the United States, all counsel heavily in favor of a restrained reading of the immovable property exception to sovereign immunity.

* * *

We thank the Court for its consideration of these issues, and we respectfully request that this letter be docketed by the Clerk of the Court.

Respectfully submitted,

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March 16, 2006

Roseann B. MacKechnie, Clerk
United States Court of Appeals for the Second Circuit
Thurgood Marshall United States Court House
40 Centre Street
New York, New York 10007

Re: *City of New York v. Permanent Mission of India, et al.*, 05-4260-cv(L), 05-4263-cv(CON)

To the Court:

This letter-brief is respectfully submitted by appellee the City of New York to address the response of the Justice Department, on behalf of the State Department ("State Department Response") to the Court's inquiry to the State Department of January 9, 2006.

1. Scope of Immovable Property Exception in International Conventions

Both the United Nations Convention on Jurisdictional Immunities of States and their Property ("U.N. Convention") and the European Convention on State Immunity ("European Convention") disallow claims of immunity not

only in actions concerning rights in immovable property, but also in actions concerning obligations arising out of the use of such property. As the State Department observes, those Conventions deal exclusively with relations between states and private persons or entities. *See, e.g.*, Explanatory Report to European Convention at ¶ 113, http://www.conventions.coe.int/Treaty/en/Treaties/Word/ 074.doc.

The Conventions are nonetheless relevant here, first, because they demonstrate the breadth of the immovable property exception to sovereign immunity as that exception was internationally recognized at and before the enactment of the FSIA in 1976. The Explanatory Report to the European Convention, which was opened to signature in 1972, provides, at ¶ 7: "By limiting the number of cases in which States can invoke jurisdictional immunity, the Convention is consistent with the trend taking place in the case-law and legal writings in the majority of countries." Both Conventions provide that a sovereign state has no immunity from suit by a private party when the suit relates to "any right or interest of the State in, or its possession or use of, . . . immovable property," or to any obligations arising out of such possession or use; both apply to proceedings relating to mortgages, whether the foreign state is mortgagor or mortgagee; and as to both, "[t]he expressions 'rights', 'use' and 'possession' must be interpreted broadly". Fifth Report on Jurisdictional Immunities of States and their Property, Yearbook of the International Law Commission ("ILC Yearbook"), 1983, vol. II(1), at 51; http://untreaty.un.org/ilc/guide/4_1.htm; *see also*, Explanatory Report on the European Convention, ¶¶ 114, 44.

Second, the record of the U.N. Convention makes clear that this case is governed by the Vienna Convention on

Diplomatic Relations, 23 U.S.T. 3227, Art. 1 & Art. 23 (1972), and the Vienna Convention on Consular Relations, 21 U.S.T. 77, Art. 32 (1969), both of which provide for local property taxation of the property at issue here. The Chairman of the Drafting Committee of the U.N. Convention stated that the issue of taxation was ultimately not addressed, not only because it concerned relations between states, but also because it was "governed by existing rules of international law and, as such, covered by the provisions of article 3, already adopted by the Commission." ILC Yearbook, 1991, v. I, at 84 ¶ 6. Article 3 states that the U.N. Convention defers to existing international law concerning the privileges and immunities of diplomatic missions and consular posts. As the Chairman further stated, the withdrawn taxation article "merely gave rise to problems of interpretation *vis-à-vis* the diplomatic and consular conventions." *Id.* Similarly, "[t]he exclusion of these matters from the field of application of the [European] Convention . . . means only that, since the provisions of the Convention may not be invoked, recourse must be had to general rules of law." Explanatory Report to European Convention at ¶ 114.

The Vienna Conventions exempt only the mission, the consulate, and the residences of the chief of mission and of the consul general, and not the staff housing at issue here. *Accord* N.Y. RPTL § 418; *see* Appellee's Brief at pp. 11-14. Consistent with the Vienna Conventions, the State Department itself has repeatedly stated that properties such as those at issue here are subject to local taxation (U.S. Department of State, Guidance for Administrative Officers § 7.8, January 4, 2004 [Joint Appendix pp. 200-201]; Diplomatic Note HC-18-93, April 14, 1993 [Joint Appendix pp. 210-211]; Diplomatic Note HC-06-93, February 17,

1993 [Joint Appendix pp. 203-205]; Diplomatic Note HC-12-01, April 5, 2001 [Joint Appendix pp. 215-216] [all advising UN missions of their obligations to pay local real property taxes on non-mission and non-head of mission residence property]; U.S. Department of State, Guidance for Administrative Officers § 7.8, January 4, 2004 [Joint Appendix pp. 200-201]; Diplomatic Note HC-18-93, April 14, 1993 [Joint Appendix pp. 210-211]; Diplomatic Note HC-06-93, February 17, 1993 [Joint Appendix pp. 203-205]; Diplomatic Note HC-12-01, April 5, 2001 [Joint Appendix pp. 215-216]). Moreover, the Congress has twice enacted legislation signaling its view that the subject matter is subject to the jurisdiction of the courts. Consolidated Appropriations Act of 2005, Pub. L. No. 108-447, § 543(3) (2004); Foreign Operations, Export Financing and Related Programs Appropriation Act of 2006, Pub. L. No. 109-102, § 543(a),(f) (both Acts referring to "unpaid taxes and interest determined to be owed by a foreign country on real property in . . . New York, New York in a court order or judgment entered against such country by a court of the United States or any State or subdivision thereof").

2. Statutory Construction of the Foreign Sovereign Immunities Act ("FSIA")

The State Department provides opinions as to matters of statutory construction, as to which, as contrasted with "the implications of exercising jurisdiction over particular petitioners in connection with their alleged conduct," *Republic of Austria v. Altmann*, 541 U.S. 677, 702 (2004), it "merit[s] no special deference" by the courts. Indeed, the Supreme Court in *Altmann* rejected a State Department recommendation "concern[ing] interpretation of the FSIA's reach – a 'pure question of statutory construction . . . well

within the province of the Judiciary.'" *Altmann*, 541 U.S. at 701.

The State Department's legal analysis is incorrect. It offhandedly disregards the only on-point appellate analysis of the issue, that of then-Judge Scalia in *Asociacion de Reclamantes v. United Mexican States*, 735 F.2d 1517, 1522 (D.C. Cir. 1984). State Department Response, p. 6 n5. *Reclamantes* construed § 68(b) of the Restatement 2d of Foreign Relations as providing for jurisdiction in cases that fall within the local action rule, and specifically cited a case seeking a declaration of the validity of a tax lien. *See* Appellee's Brief at pp. 24-29; *Reclamantes*, 735 F.2d at 1522. *Reclamantes* states: "The immovable property exception was enacted to codify . . . the pre-existing real property exception to sovereign immunity recognized by international practice." *Id.* at 1521. The rationale recognized in *Reclamantes* – that the determination of rights in land is a fundamental attribute of local sovereignty – is the same as that provided by the drafters of the U.N. Convention. *Compare* 735 F.2d at 1521 *with* Fifth Report on Jurisdictional Immunities of States and Their Property, ILC Yearbook 1983, v. I1(1), at 46-48.

The State Department is incorrect in its assertion, at p. 6, that FSIA jurisprudence limits the immovable property exception to suits directly about ownership and use. Both before and after the enactment of the FSIA, U.S. courts have exercised jurisdiction over disputes involving rights in diplomatic immovable property, including tax lien and lease disputes. In *County Bd. v. Gov't of the German Democratic Republic*, 17 Int'l Legal Materials 104 (E.D. Va. 1978) (cited in *Reclamantes*, 735 F.2d at 1522), the Court found jurisdiction to adjudicate the validity of a property tax lien. In *York River House v. Pakistan Mission*

to the U.N., 1991 U.S. Dist. LEXIS 13683 (S.D.N.Y. 1991) (Leval, J.), the Court held that the immovable property exception applied to a dispute concerning the right of a lessor to terminate a lease held by Pakistan's Mission to the U.N, although, as the court subsequently held, the lessor could not be evicted, pursuant to the Vienna Convention on Diplomatic Relations. *York River v. Pakistan*, 820 F. Supp. 760 (S.D.N.Y. 1993). In *Republic of Argentina v. City of New York*, 25 N.Y. 2d 252 (1969), the New York State Court of Appeals decided on the merits that the Argentine consulate was not subject to real property taxation. The decision was based largely on the Vienna Convention on Consular Relations, even though the United States had not yet ratified it. Moreover, as *Reclamantes*, 735 F.2d at 1521, enjoins, the FSIA exemption was grounded not solely in U.S. practice, but in "international practice," which by 1976 provided a broad exemption.

There is no basis in law for excluding liens, alone among interests in property, from the reach of the immovable property exception. *See* Appellee's Brief, at pp. 29-35. Unlike these actions to establish the validity of liens, the cases cited by the State Department, which concern zoning, tort liability arising out of conditions on property, public nuisance, and payment of back rent, are not "actions to establish a property interest in immovable property," Restatement 2d § 68(b). Therefore, there is no jurisdiction over such actions, either under the FSIA or under the local action rule.

The State Department Response, pp. 4-5, seeks to exclude tax lien cases from the exemption on the grounds that they are really about the validity of the taxes and about a money debt, not about ownership or possession. To

the contrary, the fact that a court, in the process of adjudicating the validity of real property tax liens, will necessarily render determinations concerning whether taxes are owed, does not alter the nature of the court proceeding or the substance of the claim asserted. It could just as well be argued that the dispute in *York River House* was really about whether the apartment was used as a primary residence within the meaning of the Rent Stabilization Law, or about the damages that were plaintiff's sole remedy, and that possession was merely a consequence. A case such as this, brought not to enforce but "to establish a property interest in immovable property," falls squarely within the exception as defined by the Restatement 2d and the FSIA. As the State Department's citations to the N.Y.C. Administrative Code liens demonstrate, local law, including local property law, is indeed paramount in such proceedings.

The exercise of jurisdiction here would not, as posited in the State Department Response, at p. 6, open "the door to a sweeping waiver of sovereign immunity" or expose foreign states to judicial enforcement of a multitude of allegedly frivolous interests. Tax liens, like all rights in immovable property, are created by the statutory or common law of the *situs*, and as such are subject to adjudication by the courts of the *situs*. *See* Appellee's Brief, pp. 29-33. Many of the City liens listed dismissively in the State Department Response, at p. 6, embody "payments for specific services rendered to a property," which foreign missions are specifically required to pay by the Vienna Diplomatic and Consular Conventions (Art. 23 & Art. 32, respectively), as the State Department has advised the missions. Diplomatic Note HC-18-93 (Joint Appendix pp. 206-213). Similarly, mechanic's liens would arise as a

result of failure to pay for work done on mission buildings, and provide a basis for suit both under the immovable property exception and the commercial activity exception of the FSIA. *See*, House Report, at 16 (1976 USCCAN, v. 5, at 6615). Judgment liens, of course, only arise where courts already have jurisdiction. Nor can it be said that the recognition of tax liens is comparable to the discredited practice of seizing and attaching property owned by foreign states solely to obtain personal jurisdiction over them, as was common before the FSIA created a mechanism to obtain *in personam* jurisdiction over foreign states. House Report, at 8 (1976 USCCAN v. 5, at 6606); *cf. Shaffer v. Heitner*, 433 U.S. 186 (1977).

These proceedings do not seek the seizure of property, and would not undermine the anti-attachment provisions of the FSIA, as argued in the State Department Response, pp. 7-8. By that logic, any action to recognize any rights in property would amount to a seizure, because it would, if successful, encumber the owner's rights. Whereas 28 U.S.C. § 1610 pertains to attachments, which are seizures, these proceedings seek only judgments as to the validity of liens. A tax lien cannot give rise to a pre-judgment seizure, and the City has recognized that even after judgment it cannot foreclose on the subject properties. It may be presumed that a state will honor the obligations embodied in the judgment of the Court. *See*, Testimony of Bruno A. Ristau, Chief, Foreign Litigation Section, Civil Division, Department of Justice, Hearing on H.R. 3493 (June 7, 1973), at 24. Neither *Enron Equipment v. The M/V Titan 2*, 82 F.Supp. 2d 602, 610 (W.D. La. 1999), nor *Lambertson v. U.S.*, 528 F.2d 441 (2d Cir. 1976), dictate a contrary result. *Enron* addressed a contractual consent to pre-judgment arrest and attachment. In *Lambertson*, the plaintiff sought

to overcome an express exclusion of claims for assault and battery by dressing up his claim as one for negligence.

3. Diplomatic and Foreign Relations Considerations

The United States did not on its own initiative file a statement of interest pursuant to 28 U.S.C. § 517, as it might have done, but instead responded to questions posed by this Court after briefing by the parties. The State Department Response "counsel[s] in favor of a narrow" statutory construction of the immovable property exception to sovereign immunity, and against an assertion of jurisdiction over this dispute," citing the possibility of reciprocal actions against similarly-situated American property abroad, including an allegedly retaliatory blocking of a sale of United States-owned property by an unidentified one of the appellant governments. The possibility of resentment or unlawful retaliation against United States interests is, however, present when any judgment is entered in an American court against a foreign sovereign, however firmly grounded the exercise of jurisdiction. Declining to exercise jurisdiction on this basis, without more, could give any foreign state asserting sovereign immunity a veto power over American courts in the interpretation of FSIA.

Nor is such a threat logically related to the jurisdictional question. No execution against property is contemplated by the instant proceedings, and the taxation of property such as this has long been the settled policy of the United States. Acquiescing to the State Department recommendation would call into question the efforts of appellee to apply equity and consistency to the taxation of all non-exempt properties in its jurisdiction, including UN

missions and consulates that have, to date, been paying their real-property taxes. The State Department Response thus manifests precisely the impact of changeable diplomatic interests and pressures that the FSIA was enacted to prevent. As noted by the Supreme Court, "Congress passed the Foreign Sovereign Immunities Act in order to free the Government from . . . case-by-case diplomatic pressures, to clarify the governing standards, and to '[assure] litigants that . . . decisions are made on purely legal grounds and under procedures that insure due process,' H. R. Rep. No. 94-1487, p. 7 (1976)." *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 488 (1983). "The Act codifies, as a matter of federal law, the restrictive theory of sovereign immunity, . . . and transfers primary responsibility for immunity determinations from the Executive to the Judicial Branch." *Republic of Austria v. Altmann*, 541 U.S. 677, 691 (2004). As one court has observed, "the pre-1976 practice of courts reflexively deferring to the Executive Branch's immunity determinations has been eliminated." *Wei Ye v. Jiang Zemin*, 383 F.3d 620, 624-625 (7th Cir. 2004).

The Supreme Court noted in *Altmann* that "should the State Department choose to express its opinion on the implications of exercising jurisdiction over particular petitioners in connection with their alleged conduct, that opinion might well be entitled to deference as the considered judgment of the Executive on a particular question of foreign policy," on a case by case basis. *Republic of Austria v. Altmann*, 541 U.S. at 702. Nonetheless, it "express[ed] no opinion on the question whether . . . deference [to State Department expressions of opinion] should be granted in cases covered by the FSIA". *Id.* The Court similarly left the question open in matters governed by the Federal Tort

Claims Act. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 733 (2004).

The question has since been addressed by both this Court (*Whiteman v. Dorotheum GmbH & Co KG*, 431 F.3d 57 [2d Cir. 2005]; *Abrams v. Societe Nationale des Chemins de Fer Francais*, 389 F.3d 61 [2d Cir. 2004] [dicta]), and by other Circuit Courts of Appeal. *Wei Ye v. Jiang Zemin*, 383 F.3d at 620 (dicta); *Hwang Geum Joo v. Japan*, 413 F.3d 45 (D.C. Cir. 2005). As noted by those cases and *pre-Altmann* cases, *see, e.g., 767 Third Avenue Associates v. Consulate General of Socialist Federal Rep. of Yugoslavia*, 218 F. 3d 152, 160 (2d Cir. 2000), the applicable standard is that governing political questions, the accepted formulation of which was set out by the Supreme Court in *Baker v. Carr*,, 369 U.S. 186 (1962), which standard "reflects the judiciary's concerns regarding separation of powers". *Whiteman v. Dorotheum GmbH & Co KG*, 431 F.3d at 72.

Baker noted that "it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance." 369 U.S. at 211; *see, Japan Whaling Assoc. v. American Cetacean Soc.*, 478 U.S. 221, 229-230 (1986). "Not every case touching foreign relations is nonjusticiable." *Whiteman v. Dorotheum GmbH & Co KG*, 431 F.3d at 69, citing *Kadic v. Karadzic*, 70 F.3d 232, 249 (2d Cir. 1995); *see also, Planned Parenthood Fed'n of America, Inc. v. Agency for Int'l Development*, 838 F.2d 649, 655 (2nd Cir. 1988). As the First Circuit has observed, "For jurisdictional purposes, courts must be careful to distinguish between political questions and cases having political overtones." *Ungar v. PLO*, 402 F.3d 274, 281 (1st Cir. 2005); *see also, Klinghoffer v. S.N.C. Achille Lauro Ed Altri-Gestione*, 937 F.2d 44, 49 (2d Cir. 1991).

Determining the amenability of a question to judicial resolution turns not on fear of or the likelihood of foreign repercussions, but requires a

> discriminating analysis of the particular question posed, in terms of the history of its management by the political branches, of its susceptibility to judicial handling in the light of its nature and posture in the specific case, and of the possible consequences of judicial action.

Baker v. Carr, 369 U.S. at 211-212. As noted by *Whiteman*, 431 F.3d at 71, *citing Baker*, 369 U.S. at 217:

> In pursuing a "case-by-case" inquiry under the political question doctrine, [the Court] has consistently employed one or more of the "six independent tests" identified by the Supreme Court in *Baker v. Carr*: [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Under the first three *Baker* tests, the parameters of the jurisdiction of the courts are not matters constitutionally committed to the Executive. Judicially discoverable and manageable standards exist in FSIA for resolving the

jurisdictional issue, and in the Conventions, *inter alia* for resolving the substantive issues. No policy determination not already embodied in positive law is thus required. *See, e.g. Kadic v. Karadzic*, 70 F.3d at 249; *Alperin v. Vatican Bank*, 410 F.3d 532, 555 (9th Cir. 2005) ("Deciding this sort of controversy is exactly what courts do"). It was therefore only by application of the remaining *Baker* tests that this Court in *Whiteman*, 431 F.3d at 59, and the D.C. Circuit in *Hwang Geum Joo*, 413 F.3d at 52, determined that the State Department's statements of "the expressed foreign policy interests of the United States" were entitled to deference.

Whiteman and *Hwang Geum Joo* sought redress for confiscations and atrocities made and committed before and during World War II. In *Whiteman*, the United States, by executive agreement, had joined in the establishment of an alternative international forum for the settlement of claims, as part of a settled policy, spanning two Presidential administrations, of "resolving Holocaust-era restitution claims through international agreements rather than litigation." *Whiteman*, 431 F.3d at 59. This Court therefore found that it could not "undertake independent resolution without expressing lack of the respect due" the Executive Branch because "the United States foreign policy advanced by the executive agreement [would be] substantially undermined by the continuing pendency of this case." *Id.* at 74. Similarly, in *Hwang Geum Joo*, the United States had pursued a "settled foreign policy of state-to-state negotiation with Japan," 413 F.3d at 52, to resolve war-related claims rather than permitting their resolution through private tort suits, *id.* at 50, and the Court determined that the lawsuit "would undo" that settled policy, and "disrupt Japan's 'delicate' relations with China and

Korea," thereby creating "serious implications for stability in the region." *Id.*

In the case at bar, in contrast, the United States has entered into no agreements either promising any nation immunity from civil jurisdiction beyond that recognized by FSIA or authorizing the resolution of disputes of this nature in any forum other than American courts. The State Department's own representations to appellants and other affected nations that they would be responsible for paying local property taxes on properties of the type involved in this suit indicate that an adjudication would not embarrass or demonstrate undue disrespect to a settled policy of a coordinate branch of government. It has been the settled policy of the United States, consistent with the Vienna Conventions, not to provide an exception to such property from local real property taxation. Moreover, as it concedes, the State Department has argued in the past for the exercise of jurisdiction in cases of this type. *See* State Department Response, p. 7n, conceding that it submitted an *amicus* brief in *City of Englewood v. Socialist People's Libyan Arab Jamahiriya*, 773 F.2d 31 (2d Cir., 1985), which "argued that tax liens implicated immovable property for purposes of the FSIA exception." Indeed, under the sixth *Baker* test, the greatest "potentiality of embarrassment from multifarious pronouncements by various departments on one question" would arise not from deference to the expressed views of the State Department here, but in acceding to them. As discussed *infra*, p. 4, the Congress has sought compliance with local judgments arising from the local real estate tax liabilities of United Nations missions.

Ultimately, the subject matter of these suits do not pertain to a question of foreign policy at all, but, because

they involve rights in real property located within the United States, to one of quintessentially local interest. Unlike this case, both *Whiteman* and *Hwang Geum Joo* concerned actions taken by foreign governments within their own territories. Unlike *Whiteman* and *Hwang Geum Joo*, this case concerns rights in immovable property forming part of a pre-existing and ongoing legal environment into which appellants have entered by purchasing, owning and using land in the United States, and as to which they have assumed responsibilities, subject to the limitations of international agreements, the parameters of which are appropriate to determination by local litigation. No countervailing interest has been identified that satisfies the relevant *Baker* tests so as to preclude the exercise of jurisdiction by the courts.

Respectfully submitted,

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Corporation Counsel of the
City of New York
Of counsel: Kristin Helmers
John Low-Beer
Norman Corenthal

By: /s/ _____
Norman Corenthal

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March 16, 2006

BY HAND DELIVERY

The Honorable Roseann B. MacKechnie, Clerk
United States Court of Appeals for the Second Circuit
Thurgood Marshall U.S. Courthouse
40 Foley Square
New York, New York 10007

Re: *City of New York v. Permanent Mission*,
05-4260-cv (L), 05-4263-cv (CON)

Dear Ms. MacKechnie:

We respectfully submit this letter on behalf of the Government of India and the Government of Mongolia in response to the February 23, 2006 letter-brief submitted by the Government of the United States in the above-captioned appeals. We enclose three additional copies of this letter for distribution to members of the panel (Katzmann, Hall, C.JJ., Korman, D.J.).

The Government of India and the Government of Mongolia agree with both the legal analysis set forth in the U.S. Government's letter-brief, and with its conclusion that these cases should be dismissed.

This Court posed two questions to the U.S. Government: one addressed to "considerations of diplomatic and

foreign relations"; and the other addressed to two international conventions, the United Nations Convention on Jurisdictional Immunities of States and Their Property, and the European Convention on State Immunity.

The U.S. Government has responded unequivocally that diplomatic and foreign relations concerns "counsel against an assertion of jurisdiction over this dispute," U.S. Gov't Lt. at 9, and that the language in the two conventions represents a departure from the language the U.S. Congress chose to use when it enacted the FSIA, *id.* at 3. The U.S. Government also notes that it has never become a signatory to either convention, and that the UN Convention has not yet entered into force. We note that the Government of India and the Government of Mongolia also are not signatories to either convention, and that the UN Convention has not yet entered into force because it has not yet been signed by the minimum number of States required.

The U.S. Government's views on the two questions presented are authoritative. Decisions concerning diplomatic and foreign relations are left solely to the federal government. The same is true for decisions whether or not to enter into international conventions. As the Supreme Court has repeatedly emphasized, "In respect of all international negotiations and compacts, and in respect of our foreign relations generally, state lines disappear. As to such purposes, the State of New York does not exist." *United States v. Pink*, 315 U.S. 203, 234 (1942); *see also Hines v. Davidowitz*, 312 U.S. 52, 63 (1941) ("Our system of government is such that the interest of the cities, counties and states, no less than the interest of the people of the whole nation, imperatively requires that federal

power in the field affecting foreign relations be left entirely free from local interference.").

Accordingly, for all the reasons set forth in the U.S. Government's letter brief, and all the reasons set forth in the briefs and arguments submitted by the Government of India and the Government of Mongolia, we respectfully request reversal of the district court's orders in both cases and entry of judgments dismissing all claims in both complaints on the ground of sovereign immunity.

Respectfully submitted,

/s/ John J.P. Howley
John J.P. Howley

JJPH/nmf

cc: Norman Corenthal, Esq. (By Hand)
Nicole Gueron, Asst. U.S. Attorney (By Hand)

Certificate of Service

I hereby certify that I caused true and exact copies of the attached letter brief to be served by hand on Norman Corenthal, Esq., Senior Counsel, Appeals Division, The City of New York Law Department, 100 Church Street, New York, New York 10007, and on Nicole Gueron, Assistant United States Attorney, Southern District of New York, 86 Chambers Street, New York, New York 10007, on March 16, 2006.

Dated: New York, New York
March 16, 2006

/s/ John J.P. Howley
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March 23, 2006

BY HAND DELIVERY

The Honorable Roseann B. MacKechnie, Clerk
United States Court of Appeals for the Second Circuit
Thurgood Marshall U.S. Courthouse
40 Foley Square
New York, New York 10007

Re: *City of New York v. Permanent Mission*,
05-4260-cv (L), 05-4263-cv (CON)

Dear Ms. MacKechnie:

We respectfully submit this reply letter on behalf of the Government of India and the Government of Mongolia in response to the March 16, 2006 letter submitted by the City of New York ("City Ltr.") in the above-captioned appeals. We enclose three additional copies of this letter for distribution to members of the panel (Katzmann, Hall, C.JJ., Korman, D.J.).

The City concedes that the UN and European Conventions "deal exclusively with relations between states and private persons." City Ltr. at 1. The U.S. Government agrees and adds that both conventions disclaim any application to tax disputes. Simply put, the U.S. Government and all parties to these appeals agree that the UN

and European Conventions do not apply to these tax disputes between a municipal government and two foreign nations.

The European Convention, however, is relevant to the Court's decision in these appeals because it demonstrates the distinctly different choice the U.S. Congress made when it enacted the Foreign Sovereign Immunities Act (FSIA).

I. The U.S. Congress Rejected the European Convention in Favor of a Narrower Exception When it Enacted the FSIA's "Rights in Immovable Property" Exception

The City asserts that the FSIA's "rights in immovable property exception" should be interpreted broadly to provide jurisdiction in these cases because the UN and European Conventions "disallow claims of immunity not only in actions concerning rights in immovable property, but also concerning obligations arising out of the use of such property." City Ltr. at 1. According to the City, the UN and European Conventions are relevant here because they are evidence of "the breadth of the immovable property exception to sovereign immunity as that exception was internationally recognized at and before enactment of the FSIA in 1976." City Ltr. at 2.

The language cited by the City has never been accepted as international law or practice. The U.S., India and Mongolia have never signed either convention. The UN Convention post-dates the FSIA by 28 years, and as of today has not been signed by a sufficient number of states to come into effect. And the European Convention has been open for signature for more than 33 years, yet only

eight of the 46 member states of the Council of Europe have signed it. Under these circumstances, the two conventions do not reflect international law or practice in 1976 or today.

More importantly, the legislative history of the FSIA reveals that Congress was well aware of the European Convention, and that it chose to copy some provisions of that convention but not others when it enacted the FSIA. For example, both the FSIA and the European Convention provide that a foreign state loses sovereign immunity for counterclaims "arising out of" the subject matter of the foreign state's claims. *Compare* 28 U.S.C. § 1607(b) (exception to sovereign immunity for counterclaims "arising out of the transaction or occurrence that is the subject matter of the claim of the foreign state"), *with* European Convention, Art. 1(2)(a) (exception to sovereign immunity for counterclaims "arising out of the legal relationship or the facts on which the principal claim is based"). The legislative history of the FSIA explains that similar language is used in both the FSIA counterclaim exception and the European Convention counterclaim exception because FSIA Section 1607(b) is "based upon article I of the European Convention." H.R. Rep. 94-1487, 94th Cong., 2d Sess. (1976) at 23.

In stark contrast, the U.S. Congress chose not to use the European Convention's language when it enacted the "rights in immovable property" exception in FSIA Section 1605(a)(4). Unlike the European Convention's broad language extending its immovable property exception to all "obligations arising out of" immovable property, Congress chose to provide an exception only for cases in which "rights in immovable property" are "in issue." 28 U.S.C. § 1605(a)(4). The legislative history reveals that this far

more limited language in Section 1605(a)(4) was based not on the European Convention, but on the Tate Letter and the Vienna Convention on Diplomatic Relations. *See* H.R. Rep. 94-1487, at 20.

Where, as here, Congress chose to rely upon the European Convention's broad "arising out of" language in one section of the statute, but chose narrower "in issue" language in other parts of the same statute, the different language must be given different effect. *See, e.g., United States v. Gonzales*, 520 U.S. 1, 5 (1997) ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely."). Accordingly, the only guidance available from the European Convention's immovable property exception is that Congress intended a narrower exception when it enacted FSIA Section 1605(a)(4).

II. The U.S. Government's Position Here is Consistent with Judicial Precedent

The City argues that the U.S. Government's letter to the Court in these appeals is inconsistent with the decision in *Asociacion de Reclamantes v. United Mexican States*, 735 F.2d 1517, 1522 (D.C. Cir. 1984), which the City asserts is "the only on-point appellate analysis of the issue." City Ltr. at 3. This argument ignores the fact that liens were not at issue in *Reclamantes*; the reference to liens in that case was pure *dicta*. The City's argument also ignores the Third Circuit's decision in *City of Englewood v. Socialist People's Libyan Arab Jamahiriya*, 773 F.2d 31 (3d Cir. 1985). In that case, the Third Circuit held that a tax

lien does not support jurisdiction under the FSIA's rights in immovable property exception.

In its appellate brief, the City attempted to distinguish *City of Englewood* by arguing that it did not involve a dispute over a tax lien. City Br. at 40 ("Englewood addressed the validity of the assessment, and not the validity of the lien"). Now, in response to the U.S. Government's submission, the City concedes that *City of Englewood* did involve a dispute over whether "'tax liens implicated immovable property for purposes of the FSIA exception.'" City Ltr. at 9 (citation omitted).

The City asks this Court to reject the Third Circuit's holding in *City of Englewood* based on an unreported, district court decision, *County Board v. German Democratic Republic*, 17 Int'l Legal Materials 1404 (E.D. Va. 1978), where the court found jurisdiction under both the commercial activities exception and the rights in immovable property exception. As this Court has recognized, the existence of two alternative grounds renders the "holding" in that case of little precedential value. *See, e.g., United States v. Berlin*, 472 F.2d 1002, 1008 (2d Cir. 1973) (refusing to follow Third Circuit precedent, where basis for decision "constituted merely an alternate holding"); *Olin Corp. v. Insurance Co. of N. Am.*, 221 F.3d 307, 317 (2d Cir. 2000) (where state appellate court affirmed trial court on multiple grounds, "alternate holding" was of "limited precedential value"). The weakness of this unreported decision as precedent is magnified by the facts that (a) the jurisdictional decision was never appealed, (b) the Third Circuit ultimately rejected it in *City of Englewood*, and (c) the Fourth Circuit ultimately held that the GDR property was fully tax exempt in *United States v. County of Arlington*, 702 F.2d 485 (4th Cir. 1983).

The U.S. Government's position in this case is consistent with, and supported by, the Third Circuit's holding in *City of Englewood* that tax liens do not support jurisdiction under the FSIA's "rights in immovable property" exception.

III. The U.S. Government's Diplomatic and Foreign Relations Concerns

The City's arguments against deferring to the U.S. Government's views miss the point. This Court asked for the U.S. Government's foreign policy concerns and the U.S. Government responded unequivocally. Those foreign policy concerns are important to understand the practical implications of a decision in this case, which provides insight into the reasons for Congress' stated intent to have the FSIA provide a uniform definition of sovereign immunity and its exceptions.

Reciprocity is a fundamental principle of international law and diplomatic relations. *See, e.g., Hilton v. Guyot*, 159 U.S. 113, 221 (1895) ("in all questions of international law, reciprocity must be observed and maintained as a fundamental principle"); *Standt v. City of New York*, 153 F. Supp. 2d 417, 427 (S.D.N.Y. 2001) ("Reciprocity is the foundation of international law."). Whatever rules are established by a decision in this case for foreign government-owned property in the United States will likely apply to U.S. Government-owned property in foreign countries. *Boos v. Barry*, 485 U.S. 312, 323-324 (1988) ("the concept of reciprocity that governs much of international law . . . ensures that similar protections will be accorded those that we send abroad to represent the

United States . . . mak[ing] our national interest in protecting [foreign] diplomatic personnel powerful indeed").

The U.S. Department of State operates 272 embassies, consulates, and diplomatic missions in 166 countries. *See* http://usembassy.state.gov. If the City's interpretation of the "rights in immovable property" exception were applied reciprocally against the U.S. Government in foreign countries, then the scope of the U.S. Government's immunity from suit in foreign countries would be determined by the vagaries of local lien laws in several hundred municipalities around the world.

Contrary to the City's suggestion, this is not a matter of retaliation. This is a result of the reciprocal nature of international law and practice. Congress clearly did not intend that the scope of sovereign immunity for the United States would he determined by local lien laws in 272 foreign cities, nor did it intend for sovereign immunity to be applied differently in different parts of this country based on state or local lien laws. To the contrary, Congress expressly stated its intent to ensure uniform application of sovereign immunity exceptions based on a single, unified federal law. *See* H.R. Rep. 94-1487, at 13 ("jurisdiction in the Federal courts should be conducive to uniformity in decision, which is desirable since a disparate treatment of cases involving foreign governments may have adverse foreign relations consequences").

The City's only response is that "many" liens created by state and local laws may be adjudicated under other provisions of the FSIA. City Ltr. at 5. Thus, the City argues that jurisdiction exists under the commercial activities exception for mechanic's liens arising from the failure to pay for work done on mission premises. Similarly, the City

argues that judgement liens "arise only where courts already have jurisdiction." This argument only serves to highlight the fact that the "rights in immovable property" exception is not needed to provide a forum for legitimate claims against a foreign sovereign. Where the City can demonstrate commercial activity, jurisdiction exists under the commercial activities exception. But where, as here, the property is used solely for governmental or diplomatic purposes, the City cannot use a lien to create jurisdiction where none exists.

IV. The Vienna Conventions Do Not Support the City's Arguments

The City argues that the "rights in immovable property" exception should be interpreted broadly to allow jurisdiction based on a tax lien because, according to the City, "the Vienna Convention on Diplomatic Relations, 23 U.S.T. 3227 . . . and the Vienna Convention on Consular Relations, 21 U.S.T. 77 . . . provide for local property taxation of the property at issue here." City Ltr. at 2. This argument ignores substantial precedent in U.S. courts rejecting the City's interpretation of the two Vienna Conventions.

In *United States v. County of Arlington*, 702 F.2d 485 (4th Cir. 1983), a local government sought to impose real property taxes on an apartment building owned by the German Democratic Republic and used to house its diplomatic staff. *Id.* at 486. In a statement supporting the GDR's position, the U.S. Government advised the Court "that State practice under the 1961 Vienna Convention on Diplomatic Relations . . . has become so firmly and uniformly established in exempting such property that the

continued refusal to ensure comparable treatment in the United States would violate international law." *Id.* at 489 n.9. The Fourth Circuit agreed and, adopting the U.S. Government's position, affirmed dismissal of the tax claim on the ground that housing for diplomatic staff is exempt from all real property taxation under the Vienna Convention on Diplomatic Relations. *Id.* at 490.

The Vienna Convention on Consular Relations provides a similar tax exemption. In *Republic of Argentina v. City of New York*, 25 N.Y.2d 252 (1969) (Fuld, C.J.), the City argued that consular offices were not tax exempt because international law provided tax exemptions only for diplomatic missions and the residence of the head of mission. *Id.* at 263-64. Chief Judge Fuld, writing for a unanimous court, rejected the City's argument and held that the Vienna Convention on Consular Relations did not limit tax exemptions to property "used for a 'diplomatic' purpose", but that all foreign government owned property was tax exempt so long as it "is used for a 'public' or 'governmental' purpose." *Id.* at 265.

In its appellate brief in this case, the City attempted to distinguish *Argentina* by arguing that it was based on "customary international law before ratification of the Vienna Convention." City Br. at 23. In its latest letter to the Court, however, the City now concedes that the *Argentina* decision was "based largely on the Vienna Convention on Consular Relations." City Ltr. at 4. This admission, together with the holdings in *Arlington* and *Argentina*, leave little doubt that both the Vienna Convention on Diplomatic Relations and the Vienna Convention on Consular Relations provide full tax exemptions for real property used for a governmental purpose, including for the purpose of housing diplomatic staff.

For all the foregoing reasons, and for the reasons set forth in the U.S. Government's letter and the appellants' briefs, we respectfully request reversal of the district court's order and entry of judgments dismissing both actions on the ground of sovereign immunity.

Respectfully submitted,

/s/ John J.P. Howley
John J.P. Howley

cc: Norman Corenthal, Esq.
Nicole Gueron, Assistant U.S. Attorney

Certificate of Service

I hereby certify that I caused true and exact copies of the attached letter brief to be served by hand on Norman Corenthal, Esq., Senior Counsel, Appeals Division, The City of New York, Law Department, 100 Church Street, New York, New York 10007, and on Nicole Gueron, Assistant United States Attorney, Southern District of New York, 86 Chambers Street, New York, New York 10007, on March 23, 2006.

Dated: New York, New York
March 23, 2006

/s/ John J.P. Howley
John J.P. Howley